Supreme Court, U.S.
FILED
07-896 DEC 21 2007
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No. _____

In The

Supreme Court of the United States

Ronald L. Green,

Petitioner,

vs.

United States Postal Service,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Ronald L. Green,
Petitioner, *In Pro Se*
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Questions Presented

1. Whether the Federal Employees' Compensation Act ("FECA") provides the Secretary of Labor with exclusive jurisdiction to determine if a Federal employee separated due to a compensable injury is medically qualified to return to work, or is the Secretary's authority limited to allowing or denying disability payments.

2. Whether this Court's decision in Morton v. Ruiz, 415 U.S. 199 (1974) requires an agency to follow its own regulations when a formerly injured Federal employee timely exercises his statutory right to reemployment under the FECA.

List of All Parties

All parties appear in the caption of the case on the cover page.

Table of Contents

Page

Questions Presented for Review ii

List of All Parties iii

Table of Contents iv

Table of Cited Authorities vii

Citations of the Official and Unofficial Reports 1

Statement of the Basis of Jurisdiction 1

Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations 2

Statement of the Case 4

Reasons for Granting the Petition 8

I. The Federal Circuit has decided important Federal questions in a way that conflicts with relevant decisions of this Court 10

II. The Federal Circuit decision conflicts with decisions of the Third Circuit, the Eight Circuit and the Federal Circuit's own precedents 21

Table of Contents
(continued)

Page

III. The Federal Circuit has so far departed from the accepted, usual and required course of judicial proceedings as to call for an exercise of this Court's supervisory power 28

IV. The Federal Circuit has sanctioned a decision by the Board that has so far departed from the accepted, usual and required course of administrative proceedings as to call for an exercise of this Court's supervisory power 36

The Conclusion 42

The Appendix

Ronald L. Green v. U.S. Postal Service, Case No. 2006-3425, (Fed. Cir. May 11, 2007) . . . . . App. 2.

Ronald L. Green v. U.S. Postal Service, 103 M.S.P.R. 278 (2006), Docket No. SF-0353-05-0977-I-1, Final Decision of the Board dated September 5, 2006 . App. 8

Ronald L. Green v. U.S. Postal Service, Case No. 98-3349, 194 F.3d 1330, 1999 WL 127499, 1999 U.S. App. LEXIS 3748 (Fed. Cir. March 9, 1999). . App. 26

Table of Contents
(continued)

Page

Ronald L. Green v. U.S. Postal Service, Docket No. SF-0353-98-0372-I-1, Initial Decision of the Board dated June 19, 1998 . . . . . App. 41

Order denying Combined Petition for Panel Rehearing and Rehearing en banc . . . . . App. 51

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations . . . . . App. 52 through 64

Table of Authorities

Page

Cases

Brumley v. Pena, 62 F.3d 277 (8th Cir. 1995) 23

Cranston v. U.S.P.S., Docket No. PH-0353-06-0422-I-1, 2007 MSPB 181, §§ 11, 12 and 13 (2007) . . . . . 8, 18 - 20

Dunklebarger v. Dept. of the Army, 67 M.S.P.R. 607, ¶ 1, (1995) 19

Ferdon v. U.S.P.S., 60 M.S.P.R. 326, (1994) 42

Green v. U.S.P.S., Case No. 2006-3425, (Fed. Cir. May 11, 2007) 1

Green v. U.S.P.S, 103 M.S.P.R. 278 (2006) 1

Green v. U.S.P.S., Case No. 98-3349, 194 F.3d 1330, 1999 WL 127499, 1999 U.S. App. LEXIS 3748 (Fed. Cir. March 9, 1999) 1

Green v. U.S.P.S., Docket No. SF-0353-98-0372-I-1, Decision of the MSPB dated June 19, 1998 1

Green v. MSPB, Case No. 98-3203, (Fed. Cir. March 1999) 4, 5, 24

Green v. U.S.P.S., Docket No. SF-0353-98-0034-I-1, Decision of the MSPB dated March 5, 1998 . . . . . 4, 5

Lindahl v. OPM, 470 U.S. 768 (1985) 10

Minor v. MSPB, 819 F.2d 280 (Fed. Cir. 1987) . . 21, 22

Table of Authorities

Page

Cases
(continued)

Montana v. United States, 440 U.S. 147 (1979) 14

Montoya v. U.S.P.S, 58 M.S.P.R. 104 (1993) 42

Morton v. Ruiz, 415 U.S. 199 (1974) ..... ii, 15, 20, 25

NALC v. U.S.P.S., 272 F.3d 182
(3rd Cir. 2001) 21, 22

New v. Dep't of Veterans Affairs, 142 F.3d 1259,
(Fed. Cir. 1998) 27

Raicovich v. U.S. Postal Service, 675 F.2d 417
(Fed. Cir. 1982) 24, 37

Shiflett v. U.S.P.S., 839 F.2d 669,
(Fed. Cir. 1988) 19, 25, 26

Sloan v. West, 140 F.3d 1255 (9th Cir. 1998) 14

Yuni v. MSPB, 784 F.2d 381 (Fed. Cir. 1986) 26

Constitutional Provisions

U.S. Const. amend. V .... 17, 30, 34, 35, 43, App. 52

Statutes

5 U.S.C.S. § 7702 ..... 2, 30, App. 52

5 U.S.C.S. § 7703 ..... 2, 14, 30, App. 54

Table of Authorities

Page

Statutes
(continued)

5 U.S.C.S. § 8128 ..... 2, 9 – 14, 16, 21, 22, 27, 31, 42, 43, App. 54

5 U.S.C.S. § 8145 ..... 9 – 14, 42

5 U.S.C.S. § 8149 ..... 13, 43

5 U.S.C.S. § 8151 ..... 2, 8, 12, 22, 23, 39, App. 56

28 U.S.C.S. § 1254 2

28 U.S.C.S. § 1295 14

29 U.S.C.S. § 705 ..... 2, 32, App. 57

29 U.S.C.S. § 794 ..... 2, 32, App. 58

USERRA 38, 39, 41

VEOA 2, 8, 38, 39, 41, 42

Regulations

5 C.F.R. § 302.202 ..... 2, App. 58

5 C.F.R. § 302.303 ..... 2, 6, 15, 24, 29, 36 – 38, App. 59

5 C.F.R. § 339.301 ..... 3, 41, App. 60

5 C.F.R. § 353.102 ..... 12, 21

Table of Authorities

Page

Regulations
(continued)

5 C.F.R. § 353.104 . . . . . 2, 4, 7, 17 – 19, 26, App. 61

5 C.F.R. § 353.105 . . . . . 40, 41

5 C.F.R. § 353.108 22

5 C.F.R. § 353.301 . . . . . 3, 12, 24 – 27, App. 61

5 C.F.R. § 353.304 39

5 C.F.R. § 1201.21. . . . . 7, 17, 19, 26

5 C.F.R. § 1201.22 . . . . . 17 – 19, 35

20 C.F.R. § 10.140 11

29 C.F.R. § 1630.2 . . . . . 3, App. 62

29 C.F.R. § 1630.9 41

29 C.F.R. § 1630.10 . . . . . 3, App. 62

29 C.F.R. § 1630.13 . . . . . 3, 40, App. 63

29 C.F.R. § 1630.14 40

Table of Authorities

Page

Relevant Manuals and Reports

Fed. Circuit's Guide for
Pro Se Petitioners 29, 30, 34

U.S. Postal Service Employee and
Labor Relations Manual . . . . . 15, 16, 27, App. 63

Workers' Compensation: Selected
Comparisons of Federal and State Laws,
Letter Report, 04/03/96, GAO/GGD-96-76) 13

Citations of the Official And Unofficial Reports

Ronald L. Green v. U.S. Postal Service, Case No. 2006-3425, (Fed. Cir. May 11, 2007). (See Appendix ("App.") at page 2).

Ronald L. Green v. U.S. Postal Service, 103 M.S.P.R. 278 (2006), Docket No. SF-0353-05-0977-I-1, Final Decision of the Merit Systems Protection Board dated September 5, 2006. (App. 8).

Ronald L. Green v. U.S. Postal Service, Case No. 98-3349, 194 F.3d 1330, 1999 WL 127499, 1999 U.S. App. LEXIS 3748 (Fed. Cir. March 9, 1999). (App. 26).

Ronald L. Green v. U.S. Postal Service, Docket No. SF-0353-98-0372-I-1, Decision of the Merit Systems Protection Board dated June 19, 1998. (App. 41).

Statement of the Basis of Jurisdiction

The date on which the United States Court of Appeals for the Federal Circuit ("Federal Circuit") decided Case No. 2006-3425 was on May 11, 2007.

A timely combined petition for panel rehearing and rehearing in banc was denied by the Federal Circuit on July 27, 2007, and a copy of the order denying rehearing appears at App. 51.

An extension of time to file a petition for a writ of certiorari was granted to and including December 24, 2007 on October 26, 2007, by the Honorable Chief Justice in Application No. 07A366.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations

Due to the length of the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, their citation alone is set out at this point. Their pertinent text is set out verbatim with appropriate citation in the appendix.

U.S. Const. amend. V

5 U.S.C.S.§ 7702 Actions involving discrimination

5 U.S.C.S. § 7703 Judicial review of decisions of the Merit Systems Protection Board

5 U.S.C.S. § 8128 Review of award

5 U.S.C.S. § 8151 Civil service retention rights

29 U.S.C.S. § 705 Definitions

29 U.S.C.S. § 794 Nondiscrimination under Federal grants and programs

5 C.F.R. § 302.202 Qualification requirements

5 C.F.R. § 302.303 Maintenance of employment lists

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations

(continued)

5 C.F.R. § 339.301(e)	Authority to require an examination
5 C.F.R. § 353.104	Notification of rights and obligations
5 C.F.R. § 353.301(b)	Restoration rights, Fully recovered after 1 year
29 C.F.R. § 1630.2	Definitions
29 C.F.R. § 1630.10	Qualification standards, tests, and other selection criteria
29 C.F.R. § 1630.13	Prohibited medical examinations and inquiries

U.S. Postal Service Employee and Labor Relations Manual § 546.13, Issue 12, dated 05/01/89

Statement of the Case

(including the undisputed facts and the procedural history)

1. Petitioner Ronald L. Green ("Green"), an African-American and a preference-eligible veteran, was an employee in good standing when he was separated on January 7, 1994 from his Maintenance Control and Stock Clerk position with the United States Postal Service ("Postal Service") due to a compensable injury. (App. 42).

2. When the Postal Service separated Green, the agency did not notify him of his rights, obligations, and benefits relating to Government employment, including his appeal and grievance rights as required by 5 C.F.R. § 353.104. (App. 18).

3. On July 2, 1997, Green applied for reemployment with the Postal Service after his treating physician indicated he could return to full employment without restriction. (Green v. U.S. Postal Service, MSPB Docket No. SF-0353-98-0034-I-1, (Initial Decision, October 31, 1997)).

4. However, the Postal Service refused to restore Green's employment and hired others in his place because the agency maintained he was not "fully recovered" since the Office of Workers' Compensation Programs ("OWCP") had not terminated his compensation benefits. (Green v. MSPB, Case No. 98-3203, 194 F.3d 1330 (Fed. Cir. 1999)).

5. After Green filed timely appeals, the Merit Systems Protection Board ("Board") and the United States Court of Appeals for the Federal Circuit

("Federal Circuit') sustained the Postal Service's refusal in Docket No. SF-353-98-0034-I-1 and Case No. 98-3203, respectively. (Id.).

6. On January 2, 1998, Green timely applied for reemployment with the Postal Service after OWCP terminated his compensation benefits on December 15, 1997 when it determined he was fully recovered and entitled to priority consideration for reemployment. (App. 42).

7. Instead of following the implementing regulations of the FECA and the agency's own regulations which require it to put Green on its priority reemployment list and to reemploy him when a vacancy became available, the Postal Service directly challenged OWCP's determination that he was medically qualified to return to work. (App. 45).

8. After Green timely filed his second Board appeal regarding the Postal Service's denial of restoration, the Postal Service argued in the Board's June 1998 hearing that OWCP relied upon a medical report from Green's treating physician that allegedly "did not meet the agency's published standards governing such cases" and the report allegedly "assumed certain facts (known) to be in error." (Id.). Eventually, however, it was undisputed below that these so-called standards and conditions did not and do not exist.

9. The Board did not consider Green's "affirmative defenses of illegal discrimination, retaliation for prior EEO activity and harmful procedural error" and dismissed Green's appeal in Docket No. SF-0353-98-0372-I-1 for lack of

jurisdiction because "there is no appealable matter" since the agency's actions were "reasonable in the circumstances, and consistent with its normal practice" because the agency allegedly "acted within its discretion under 5 C.F.R. § 302.303(a)(2)." (App. 42 and 48).

10. Green timely appealed the sole issue of Board jurisdiction to the Federal Circuit. In March 1999, although the court found the Board erred when it dismissed the appeal for lack of jurisdiction, the court nevertheless affirmed the Board's decision and did not remand Docket No. SF-0353098-0372-I-1 for consideration of all claims and a decision on the merits. (App. 27 and 40).

11. In the meantime, even though Green agreed in early 1998 to submit to the agency's requirement for an additional psychiatric examination, the Postal Service did not schedule the examination until nearly two years later. (App. 47).

12. After the December 1999 psychiatric examination, the agency's contract physician reported that Green was indeed fully recovered from his compensable injury, but he diagnosed Green has a Narcissistic Personality Disorder ("NPD") and the NPD actually caused Green's compensable injury and his "activism and advocacy" of filing grievances and Equal Employment Opportunity ("EEO") complaints. (App. 17).

13. Despite medical reports from other qualified physicians that indicated Green was totally capable of performing the essential functions of his former position, the Postal Service continued to "consider" his

1998 application for reemployment and the agency never notified Green that his application was denied or that his employment would not be restored even though the agency's own regulations, as well as the FECA, require it to do so. (App. 3, 17, 31 and 38).

14. Moreover, the Postal Service never notified Green of his appeal and grievance rights as required by 5 C.F.R. § 353.104 and 5 C.F.R. § 1201.21. (App. 18).

15. On February 7, 2005, under the Veterans Employment Opportunities Act of 1998 ("VEOA"), Green filed a compliant with the Department of Labor alleging his rights as a preference-eligible veteran were being violated by the Postal Service's continuing refusal to rehire him while it was hiring others with less priority in his place. (App. 10 and 19).

16. On September 8, 2005, the Department of Labor informed Green that his application for reemployment was no longer on file at the Postal Service and Green timely filed his third appeal with the Board on September 20, 2005 in Docket No. SF-0353-05-0977-I-1. (Id.).

17. Subsequently, the Board, *inter alia*, dismissed:

1) on the basis of res judicata, the Postal Service's denial of Green's 1998 application for restoration;

2) as untimely, allegations of subsequent denials of restoration; and

3) for failure to state a claim upon which relief can be granted, Green's VEOA claim.

(Green v. U.S. Postal Service, MSPB Docket No. SF-0353-05-0977-I-1, September 5, 2006).

18. On May 11, 2007, after Green filed a timely appeal with the Federal Circuit in Case No. 2006-3425 regarding the sole issues of timeliness and Board jurisdiction, the Federal Circuit affirmed the Board. (App. 7).

19. On July 27, 2007, the Federal Circuit denied Green's timely combined petition for panel rehearing and rehearing en banc. (App. 51).

20. In October 2007, after Green requested the Board reopen Docket No. SF-0353-05-0977-I-1 since it overruled that decision regarding timeliness in Cranston, the Board stated it would not provide further review. (Cranston v. U.S. Postal Service, Docket No. PH-0353-06-0422-I-1, 2007 MSPB 181, §§ 11, 12 and 13 (2007); Application for Extension No. 07A366).

Reasons for Granting the Petition

This case is about who has the ultimate authority to determine when former Federal employees separated due to compensable injuries are medically qualified to return to work.

The FECA provides Federal employees with the statutory right to be reemployed when they recover from their compensable on-the-job injuries. (5 U.S.C. § 8151).

To ensure efficiency, equity and uniformity, Congress provided the Secretary of Labor or his designee (OWCP) with exclusive jurisdiction to administer FECA rights and benefits and to decide all questions arising there under. (5 U.S.C. §§ 8128(b) and 8145).

The long accepted, usual and required course of judicial and administrative proceedings is to defer to OWCP for any questions pertaining to the FECA and the administration of the rights and benefits provided there under.

However, after the Postal Service questioned the propriety of OWCP's determination that Green was fully recovered and entitled to priority consideration for reemployment, the Board and the Federal Circuit acted contrary to the unambiguous and comprehensive language of the FECA, contrary to relevant decisions of this Court, contrary to decisions of the Third and Eight Circuits, and contrary to the Board's and the Federal Circuit's own rules, procedures and precedents.

It can truly be said that this case represents an unprecedented attack on OWCP's exclusive jurisdiction to administer FECA rights and benefits and to decide all questions arising under the FECA.

Moreover, because both the Federal Circuit and the Board did not follow the controlling law, their own rules and precedents, or relevant decisions of this Court, the most disturbing and troubling aspect of this case is that the decisions rendered thus far undermine the rule of law and are contrary to fundamental principles of justice and fair play.

As a result, the decisions below will cause significant confusion and will generate previously unwarranted litigation for agencies and injured workers in the application and interpretation of the FECA, and agencies will be emboldened to act contrary to their own regulations and other laws enacted by Congress to protect Federal employees.

Accordingly, because the Federal Circuit decision conflicts with relevant decisions of this Court and with decisions of other circuits and its own precedents, and because it has so far departed from the accepted, usual and required course of judicial and administrative proceedings as to call for an exercise of this Court's supervisory power, this petition for a writ of certiorari should be granted.

I. The Federal Circuit has decided important Federal questions in a way that conflicts with relevant decisions of this Court.

There are three relevant decisions of this Court that require a different judgment and outcome in this case.

In the first relevant decision, this Court clearly stated the "unambiguous and comprehensive" language of 5 U.S.C. § 8128(b) "evidences congressional intent to bar review altogether" of OWCP's exclusive jurisdiction to administer and to decide all questions arising under the FECA. (Lindahl v. OPM, 470 U.S. 768, 779 – 780 & n. 13 (1985); 5 U.S.C. §§ 8128(b) and 8145).

Under 5 U.S.C. § 8128(b), "the actions of the Secretary or his designee (OWCP) in allowing or denying a payment . . . is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." (5 U.S.C. § 8128(b)) (emphasis added).

Moreover, under 5 U.S.C. § 8145, "The Secretary of Labor (or his designee, the OWCP) shall administer, and decide all questions arising under, this subchapter." (5 U.S.C. § 8145) (emphasis added).

Nevertheless, in its decision below, the Federal Circuit determined the provisions of 5 U.S.C. § 8128(b) "preclude review of the Secretary's allowance or denial of disability payments – here the termination of Green's disability payments. They do not preclude the Postal Service from itself determining whether a disabled former employee whose disability payments have been terminated is qualified to return to work." (App. 6).

The FECA is intended to be remedial in nature, and proceedings under it are non-adversarial. (20 C.F.R. § 10.140). Thus, the Federal Circuit's contrary decision would be correct only if the determination of when a former employee is qualified to return to work was not intended by Congress to be a non-adversarial question under the FECA.

However, the statute and implementing regulations of the FECA clearly show those non-

adversarial determinations are to be made by OWCP, exclusively.

The retention / restoration rights for injured workers who recover from their injuries are set forth in 5 U.S.C. § 8151 of the FECA.

Furthermore, under 5 C.F.R. § 353.301(b) of the FECA, an employee, like Green, who was separated because of compensable injury and whose "full recovery" takes longer than 1 year from the date he was eligible for compensation:

> is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's. . . reemployment priority list for the excepted service.

(5 C.F.R. § 353.301(b)).

Moreover, "Fully recovered means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent." (5 C.F.R. § 353.102; App. 43).

Accordingly, because the OWCP is the sole arbiter with exclusive jurisdiction under 5 U.S.C. § 8128(b) and 5 U.S.C. § 8145 to determine all questions arising under the FECA, including whether an injured Federal worker, like Green, has fully recovered and to terminate his compensation

benefits on that basis, the Postal Service, the Board and the Federal Circuit acted outside their sphere of authority when they presumed to determine whether Green was medically qualified to return to work.

Moreover, under 5 U.S.C. §§ 8145 and 8149, only the OWCP can determine the "the nature and extent of the proof and evidence required" under the FECA. (5 U.S.C. §§ 8145 and 8149).

Indeed, according to the General Accountability Office ("GAO"), "Both federal and state workers' compensation programs emphasize returning employees to work with their original employers" as an integral part of the law, and employing agencies cannot appeal OWCP claims decisions either administratively to OWCP, to the Employees' Compensation Appeals Board ("ECAB"), or to the courts. (Workers' Compensation: Selected Comparisons of Federal and State Laws, Letter Report, 04/03/96, GAO/GGD-96-76).

Accordingly, as a matter of law, the OWCP's 1998 determination that Green fully recovered from his compensable injury and was entitled to priority consideration for reemployment is final and conclusive for all purposes and not subject to review. (5 U.S.C. § 8128(b); 5 U.S.C. § 8145).

Therefore, because it is undisputed Green was separated from his Postal Service position due to a compensable injury, since February 1998 when he first appealed to the Board in order to enforce his FECA restoration rights, no other "official of the United States" and no court has had competent jurisdiction or the necessary authority to decide any issue relating to

Green's medical condition or his restoration rights under the FECA.

In the second relevant decision, in regards to the issue of preclusion, this Court holds preclusion cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the issues in the earlier case or where the court did not have competent jurisdiction over the subject matter. (Montana v. United States, 440 U.S. 147, 153 (1979)).

Here, however, as set forth above, the Federal Circuit determined its March 1999 decision in Case No. 98-3349 is entitled to preclusive effect even though neither the Board nor the Federal Circuit considered or decided Green's "affirmative defenses of illegal discrimination, retaliation for prior EEO activity and harmful procedural error." (App. 42 and 48).

Moreover, the Federal Circuit does not have competent jurisdiction to decide the merits of a case, like Green's, involving allegations of illegal discrimination. (28 U.S.C. § 1295(a)(9); 5 U.S.C. 7703(b)(1); Sloan v. West, 140 F.3d 1255, 1261 (9th Cir. 1998)).

In addition, as discussed above, the Federal Circuit does not have jurisdiction to review medical determinations made by the OWCP under the FECA. (5 U.S.C. §§ 8128(b) and 8145).

And finally, because the Federal Circuit's decision in Case No. 3349 was not a final decision on the merits since it merely affirmed the Board's

dismissal for lack of jurisdiction and it did not resolve Green's "affirmative defenses of illegal discrimination, retaliation for prior EEO activity and harmful procedural error," the decision is not entitled to preclusive effect because the requirement for a final decision on the merits was also not met for *res judicata* to apply. (App. 26 and 40).

In the third relevant decision, this Court clearly stated, "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." (Morton v. Ruiz, 415 U.S. 199, 235 (1974)).

In this case, the Postal Service's own regulations establish it's obligation to put employees entitled to priority consideration for reemployment, like Green, on a priority reemployment list, without conditions, and to rehire them when vacancies become available. (Postal Service Employee and Labor Relations Manual ("ELM") § 546.13, Issue 12, dated 05/01/89 at page xxiv; See also 5 C.F.R. § 302.303(a)(1)).

Moreover, according to the Postal Service's ELM:

> If the (agency) medical officer questions the medical procedures and/or determination of the employee's attending physician, no administrative action may be taken to change the employee's compensation or employment status until the medical issue is settled.

(ELM § 547.33) (emphasis added).

If OWCP determines an employee is not fully recovered from his or her compensable injury, it will not terminate compensation benefits.

Accordingly, even under the Postal Service's own regulation, the agency should have raised any legitimate medical concerns it may have had with the OWCP before Green's compensation benefits were terminated.

Having failed to do so, the agency had no authority to delay Green's restoration to duty by directly attacking OWCP's medical determination that Green was fully recovered from his compensable injury and qualified for reemployment because OWCP's determination was "final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." (5 U.S.C. § 8128(b)) (emphasis added).

In addition, Postal Service regulations require:

> If the former employee will not be reemployed, the appointing official must . . . notify the employee in writing of that fact, including a paragraph informing the individual of the right to appeal to the (Board), and send a copy to the OWCP.

(ELM § 546.65) (emphasis added).

Here, not only is it undisputed that the Postal Service failed to notify Green of his rights in the form and manner prescribed by 5 C.F.R. § 1201.21, 5 C.F.R. § 353.104, and its own regulation, but more importantly, it is also undisputed the agency failed for eight years to comply with its own regulations that require it to notify Green in writing that he would not be reemployed. Instead, the Postal Service's unlawful omission frustrated and denied Green's appeal and due process rights for more than eight years.

Under 5 C.F.R. § 1201.22(b)(1), "an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later." (5 C.F.R. § 1201.22(b)(1)).

However, in this case, it is undisputed that the Postal Service failed to establish or publish an effective date for any action regarding Green's application for restoration to duty and the agency also failed to publish or notify Green regarding any decision it made regarding his application for reemployment.

Nevertheless, the Board determined Green's September 2005 appeal was untimely under 5 C.F.R. § 1201.22(b)(1). (App. 16 - 18).

However, on these facts, the 30 day limit of 5 C.F.R. § 1201.22(b)(1) does not apply. Under 5 C.F.R. § 1201.22(b)(2), "The time limit prescribed by paragraph (b)(1) for filing an appeal does not apply where a law or regulation establishes a different

time limit or where there is no applicable time limit." (5 C.F.R. § 1201.22(b)(2)).

The 30 day time limit never began to run because Green never received a decision, either orally or in writing, from the agency. Moreover, it appears the Postal Service deliberately failed to provide Green with any decision for the specific purpose of not providing him with the necessary grounds to file an appeal with the Board.

It would not only be unfair and unjust to the highest degree, it would also open up the floodgates of procedural abuse and additional litigation if courts allow Federal employers to avoid liability for their questionable actions by simply never providing decision letters to aggrieved employees as the Postal Service did here.

Here, the Board ruled, even though the Postal Service failed to notify Green of its decision or to notify him of his appeal rights, that Green was required under 5 C.F.R. § 353.104 to exercise due diligence and still file a "timely" appeal with the Board. (App. 18).

However, later, the Board recognized its error. Holding 5 C.F.R. § 353.104 does not require an employee to exercise diligence in discovering his appeal rights when an agency fails to provide them, the Board overruled its decision regarding the timeliness issue in Green's case. (Cranston v. U.S. Postal Service, Docket No. PH-0353-06-0422-I-1, 2007 MSPB 181, ¶ 13, (2007)).

In its analysis of Cranston, the Board concluded "the interpretation of 5 C.F.R. § 353.104 set forth in Green, 103 M.S.P.R. 278, ¶ 15, conflicts with the Board's prior interpretation of that regulation as set forth in Dunklebarger, 67 M.S.P.R. at 612 . . . (and) we conclude that Dunklebarger contains the correct interpretation of this regulation." (Cranston at ¶ 12).

In Dunklebarger, the Board reopened that case "in order to determine whether the administrative judge properly dismissed the appellant's restoration appeal as untimely in light of the court's decision in Shiflett v. U.S. Postal Service, 839 F.2d 669 (Fed. Cir. 1988), and the notice requirements of 5 C.F.R. § 353.104." (Dunklebarger v. Dept. of the Army, 67 M.S.P.R. 607, ¶ 1, (1995)).

The Dunklebarger Board found "the underlying obligation in restoration to duty cases was and remains that the agency must give notice to the employee of appeal rights to the Board when it decides a matter appealable to the Board. This requirement is codified at 5 C.F.R. § 1201.21, and has not been amended. . . (T)he agency's 'flagrant disregard' of the notice requirement under 5 C.F.R. § 1201.21 is still the critical fact in this case. See Shiflett, 839 F.2d at 673." (Dunklebarger at ¶ 14).

Accordingly, when the Cranston Board overruled Green and reaffirmed the interpretation of 5 C.F.R. § 353.104 as found in Dunklebarger, the Board reestablished Shiflett as the controlling law because, according to Dunklebarger, "The new language in 5 C.F.R. § 353.104 as to 'due diligence,' . . . does not divest agencies of the fundamental

obligation to notify appellants of their appeal rights." (Id. at ¶ 11).

However, even though the Board overruled Green v. U.S. Postal Service, 103 M.S.P.R. 278 (2006) in Cranston, curiously, it nevertheless distinguished the case on the facts.

Clearly, if Green's case could be distinguished on the facts, it would not have been necessary for the Board to overrule it in the first place, but, in October 2007, the Board denied Green's request to reopen his case.

Nevertheless, because Green's restoration rights under the FECA were affected, under Morton, it was incumbent upon the Postal Service to comply with its own procedures. Having failed to do so, the Postal Service had no authority to delay or deny Green's restoration to duty and the Board and the Federal Circuit erred as a matter of law when they required strict compliance from Green, under impossible conditions and contrary to prior precedents, but allowed the Postal Service to violate the law, including its own rules and procedures, with impunity.

Green's restoration rights under the FECA cannot and should not be denied because the Postal Service failed to comply with its own procedures governing its obligations and responsibilities under the FECA.

II. The Federal Circuit decision conflicts with decisions of the Third Circuit, the Eighth Circuit and the Federal Circuit's own precedents.

In its decision below, the Federal Circuit maintains the provisions of 5 U.S.C. § 8128(b) "preclude review of the Secretary's allowance or denial of disability payments – here the termination of Green's disability payments. They do not preclude the Postal Service from itself determining whether a disabled former employee whose disability payments have been terminated is qualified to return to work." (App. 6).

However, as discussed above, under the FECA, a former employee is considered "fully recovered" only after the OWCP terminates his or her compensation benefits on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent. (5 C.F.R. § 353.102).

To support the decision below, the Federal Circuit relies on Minor and NALC for the propositions that "a decision of OWCP or the (ECAB) 'does not bind' the (Board) acting within its own separate sphere of deciding the propriety of restoration" and "that (the) arbitrator of employee's wrongful termination claim was not bound by factual conclusions made by the (OWCP)," respectively. (Minor v. Merit Systems Protection Board, 819 F.2d 280, 283 (Fed. Cir. 1987); National Association of Letter Carriers v. U.S. Postal Service, 272 F.3d 182 (3rd Cir. 2001)).

However, both Minor and NALC are inapposite here because those cases involve individuals who were separated for "just cause," namely, for filing false claims, not due to a compensable injury as Green was separated in this case. Under those circumstances, where an individual was separated for cause, restoration rights do not apply. (5 C.F.R. § 353.108).

Moreover, in NALC, the United States Court of Appeals for the Third Circuit ("Third Circuit") recognized "the sphere of the employing agency and of the (Board) or arbitrator (is) on review of the adverse action," and that court merely adopted the Federal Circuit's holding in Minor that "differentiated between compensation proceedings and other proceedings in determining the effect of section 8128(b), holding it binding only in the former." (NALC at 188).

Thus, "factual conclusions made by (OWCP) in granting employee benefits under the FECA" are the exclusive jurisdiction of OWCP, but review of adverse actions is within the jurisdiction of the employing agency and the Board. (Id. at 182).

Furthermore, benefits under the FECA are not limited to the allowance or denial of disability payments. The restoration rights of injured employees are also distinct and tangible benefits under the FECA. (5 U.S.C. § 8151).

Here, this was not an adverse action appeal because there was and is no allegation that Green engaged in any misconduct or any inappropriate

behavior, other than that he filed grievances and engaged in other EEO protected activities.

The Postal Service merely attacked OWCP's determination that Green was medically qualified to return to work.

By doing so, the agency was not acting within its sphere of authority to review an adverse action, but rather it was intruding impermissibly upon OWCP's exclusive jurisdiction to administer the rights and benefits under the FECA and to decide all questions arising there under.

The Federal Circuit's instant decision is also contrary to previous holdings by the United States Court of Appeals for the Eighth Circuit ("Eight Circuit").

In Brumley, the Federal government conceded that a person receiving Office of Personnel Management ("OPM") disability retirement payments or workers' compensation benefits from OWCP is not precluded from applying for priority consideration for restoration to employment under section 8151. (Brumley v. Pena, 62 F.3d 277, 279 (8th Cir. 1995); 5 U.S.C.S. § 8151(b)(2)).

Thereafter, the Eighth Circuit held "the termination of benefits would serve to establish a prima facie case of full recovery, and a pre-reemployment medical examination would not be necessary to invoke restoration rights under section 8151." (Id. at 280).

However, more so than decisions from other circuits, the Federal Circuit's instant decision is contrary to many of that court's own precedents.

After his treating physician indicated he was fully recovered in 1997 and Green promptly applied for reemployment, the Federal Circuit stated Green was not entitled to priority consideration because the OWCP had not terminated his compensation benefits. (Green v. MSPB, Case No. 98-3203 (Fed. Cir. 1999)).

Nevertheless, even after OWCP determined he was fully recovered and terminated his compensation benefits on that basis, the Federal Circuit did not follow its own law of the case. Instead, the court determined Green was still not entitled to priority consideration due to the Postal Service's attack of OWCP's determination that he was fully recovered.

Moreover, according to another Federal Circuit precedent, "To comport with the (FECA), priority consideration requires that a former employee in good standing at the time of his injury, who has not engaged in egregious behavior of the sort enumerated in 5 C.F.R. § 302.203, must be placed on an appropriate priority employment list and reemployed when vacancies arise." (Raicovich v. U.S. Postal Service, 675 F.2d 417, 425 (Fed. Cir. 1982) (emphasis added); 5 C.F.R. 302.303(a)(1) and (b)(3)).

Furthermore, under 5 C.F.R. § 353.301(b), an employee, like Green, who was separated because of compensable injury and whose "full recovery" takes

longer than 1 year from the date he was eligible for compensation:

> is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's . . . reemployment priority list for the excepted service. (5 C.F.R. § 353.301(b)).

Here, it is undisputed Green was an employee in good standing when he was separated in January 1994 from his Maintenance Control and Stock Clerk position with Postal Service due to a FECA compensable injury.

It is also undisputed that Green applied for reappointment with the Postal Service within 30 days of the cessation of his FECA compensation benefits.

Nevertheless, Green was never placed on the Postal Service's priority reemployment list and the agency hired others with less priority in his place and neither the Board nor the Federal Circuit considered the agency's failure and subsequent actions to be a denial of Green's restoration right.

In addition, just as this Court held in Morton, the Federal Circuit has also previously held that an agency must follow all applicable procedures. (Morton v. Ruiz, 415 U.S. 199 (1974); Shiflett v. U.S.

Postal Service, 839 F.2d 669, 674 (Fed. Cir. 1988); Yuni v. MSPB, 784 F.2d 381 (Fed. Cir. 1986)).

Specifically in Shiflett, the Federal Circuit clearly stated:

> The critical and controlling fact is not the alleged lack of diligence on the part of the petitioner but rather the flagrant violation of the regulations by the (agency) in failing to give the petitioner notice of (his) rights in the form and manner prescribed by the regulations at the time of the (agency's) decision.

(Shiflett v. U.S. Postal Service, 839 F.2d 669, 673 (Fed. Cir. 1988)).

However, in addition to the undisputed fact that the agency failed to notify Green of his rights in the form and manner prescribed by 5 C.F.R. § 1201.21, the Postal Service, *inter alia*, also failed:

1) to notify Green at any time regarding his rights, obligations, and benefits relating to his Government employment, including any appeal and grievance rights as required by 5 C.F.R. § 353.104;

2) to put Green on its priority reemployment list when he timely applied for reemployment after OWCP determined he was fully recovered as required by 5 C.F.R. § 353.301(b);

3) to schedule the psychiatric examination it required for nearly 2 years even though it was undisputed Green was entitled to priority consideration under 5 C.F.R. § 353.301(b); and

4) for over 8 years to notify Green that he would not be reemployed even though it was required to do so, in writing, by its own regulation, ELM § 546.65.

Based on the Postal Service's flagrant violation of the aforementioned procedures and regulations, it is clear the Federal Circuit did not follow its own precedent that also required that the Postal Service follow all applicable procedures in this case.

And finally, and perhaps most clearly demonstrative of the court's departure in this case from its own precedents, even though the Federal Circuit decided here that the provisions of 5 U.S.C. § 8128(b) "do not preclude the Postal Service from itself determining whether a disabled former employee whose disability payments have been terminated is qualified to return to work," previously the Federal Circuit held:

> "It is the OWCP, not employing agencies or the Board, that possesses the requisite expertise to evaluate whether a position is suitable for an employee in light of that employee's particular medical condition."

(New v. Dep't of Veterans Affairs, 142 F.3d 1259, 1264 (Fed. Cir. 1998)).

III. The Federal Circuit decisions have so far departed from the accepted, usual and required course of judicial proceeding as to call for an exercise of this Court's supervisory power.

The Federal Circuit decisions departed from the accepted, usual and required course of judicial proceedings because the Federal Circuit:

1) failed to remand a mixed case with allegations of illegal discrimination for a decision on the merits;

2) exceeded its jurisdiction when it reviewed the merits of a case involving allegations of illegal discrimination;

3) exceeded its jurisdiction when it reviewed a determination that is the exclusive jurisdiction of the OWCP;

4) misstated relevant facts and assumed other facts not found or evidenced in the record or decisions below; and

5) overlooked the relevant undisputed facts and evidence of record and applied the wrong law.

Green's appeal to the Board in Case No. SF-0353-98-0372-I-1 in February 1998 alleged the Postal Service improperly denied him priority consideration for reemployment as required under the FECA, and the denial was based in part on illegal

discrimination, retaliation for prior EEO activity, and harmful procedural error. (App. 42)..

After the June 1998 hearing, the Board concluded the Postal Service's actions were "reasonable in the circumstances, and consistent with its normal practice" and "within its discretion under 5 C.F.R. § 302.303(a)(2)." (App. 47 and 48).

The Board dismissed the complaint for lack of appellate jurisdiction. Notably, the Board specifically indicated it did not address what it referred to as the "affirmative defenses of illegal discrimination, retaliation for prior EEO activity, and harmful procedural error." (Id.).

Green appealed the sole issue of Board jurisdiction to the Federal Circuit in Docket No. 98-3349. (App. 26). Even though the Federal Circuit reversed the Board on the jurisdictional issue, the court nevertheless affirmed the decision in March 1999 and did not remand the case for a decision on the merits as the court's "Guide for Pro Se Petitioners Filing Petitions for Review of Initial Decisions of Administrative Judges of the Merit Systems Protection Board ("Guide") indicated they were required to do (hereinafter, "First Decision").

In its Guide, the Federal Circuit cautioned petitioners that for:

> *Cases dismissed for lack of jurisdiction or for untimeliness* – If the board dismissed your case for lack of jurisdiction or because you did not file on time, you must limit your petition for review to these issues. In that situation,

> this court will not consider the merits of your case (whether you deserve to win or lose your case on the facts and the law) and, if this court were to reverse the board on its jurisdictional or timeliness ruling, your case would be remanded to the board to consider the merits. If jurisdiction or timeliness was the basis of the decision you are appealing, you will waste your time and effort, and will unduly burden this court, if you discuss the merits.

(Federal Circuit's Guide, Item #8).

As a result, the case did not receive a final decision on the merits, including the claims of illegal discrimination, retaliation for prior EEO activity, and harmful procedural error that were properly raised but not considered by the Board.

It also appears the court's First Decision violated Green's Constitutional right to substantive and procedural due process because the Federal Circuit did not follow its own rules and allow a decision on the merits for any of the claims Green properly raised before the Board.

Moreover, as set forth in the Federal Circuit's Guide and in 5 U.S.C. §§ 7702 and 7703, the Federal Circuit does not have jurisdiction to review cases, such as this one, involving claims of discrimination.

According to its Guide, the Federal Circuit "does not have jurisdiction to review cases involving bona fide claims of discrimination that were raised before the (Board)." (Id. at #6).

Therefore, the Federal Circuit acted outside its sphere of authority when it considered the merits of Green's mixed case involving bona fide claims of discrimination.

In addition, it was undisputed that the OWCP terminated Green's compensation benefits on the basis that he fully recovered from his compensable injury and was entitled to priority consideration for reemployment.

As discussed in comprehensive detail above, that OWCP determination was "(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." (5 U.S.C. § 8128(b)).

Therefore, the Federal Circuit acted outside its sphere of authority when it chose to review the OWCP's determination that Green fully recovered from his compensable injury and was entitled to priority consideration for reemployment.

Moreover, the First Decision erroneously stated "Dr. Collect, the examining physician, advised Green that the physical examination seemed fine to him, but that Green needed to undergo a psychiatric evaluation by a specialist." (App. 32).

However, it was only after Dr. Collect spoke with Postal Service officials that he allegedly required a second psychiatric examination. Postal Service officials admitted they require additional

medical examinations by specialists only when applicants have a history of disability. (App. 45).

If true, such a practice is a blatant violation of the Rehabilitation Act of 1973 on its face. Under the Rehabilitation Act, Federal agencies are specifically prohibited from discriminating against an otherwise qualified individual with a history of disability by reason of his or her disability. (29 U.S.C. § 705(20)(B); 29 U.S.C. § 794).

In addition, the First Decision also stated erroneously that "Green . . . was not further considered by the Postal Service for reemployment . . . (B)ecause he refused to undergo the second psychiatric evaluation, the Postal Service was justified in taking no further action on his priority reemployment request." (App. 40).

However, as indicated in the Board's decision dated 06/19/1998, Green agreed to comply with the Postal Service's required psychiatric examination even before the hearing but the Postal Service chose not to schedule it until December 1999. (App. 47).

Although the Postal Service never issued a final decision regarding Green's timely application for reemployment, internal Postal Service documents evidence that the agency continued to consider his 1998 application for reemployment up until at least December 2001.

And finally, in its third error, the Federal Circuit considered what it called "all the affirmable implicit and explicit findings of the AJ." (App. 40).

In other words, the panel assumed the Board's AJ made the necessary findings to support his conclusions. However, as demonstrated herein, that assumption was incorrect because the AJ failed to consider all the relevant facts and controlling laws that were necessary to support his erroneous conclusion regarding the alleged "reasonableness" of the Postal Service's actions because the AJ did not consider, inter alia, Green's claims of illegal discrimination, retaliation for prior EEO activity and harmful procedural error.

In Docket No. 2006-3425, Green petitioned the Federal Circuit to review the issues regarding jurisdiction and timeliness in the Board's recent 2006 decision in Case No. SF-0353-05-977-I-1.

Based on the Secretary of Labor's exclusive jurisdiction over the administration of the rights and benefits under FECA, Green pointed out that the Postal Service and the Board acted outside their sphere of authority in 1998 when the Board determined it was "reasonable in the circumstances" for the Postal Service to demand additional medical examinations for Green that were not required of other applicants, especially after the OWCP had already determined he fully recovered and was entitled to priority consideration for reemployment.

In addition, in Docket No. 2006-3425, Green also pointed out that the First Decision was outside the Federal Circuit's sphere of authority because the court considered the merits of a mixed case that contained allegations of illegal discrimination and retaliation and the court did not remand the case for a decision on the merits.

After Green was cautioned by the Federal Circuit's Guide not to discuss the merits of his appeal, the First Decision also failed to provide notice and an opportunity in Docket No. 98-3349 for Green to be heard on the merits prior to the court's consideration of the merits and affirming the Board.

Nevertheless, on May 11, 2007, the Federal Circuit affirmed the Board's 2006 decision despite the undisputed facts and the controlling law discussed above.

In Docket No. 2006-3425, the Federal Circuit had the opportunity to remedy the damage inflicted upon Green's due process rights in Docket No. 98-3349.

Instead, the court inflicted additional harm by misstating relevant facts and by ignoring the undisputed facts and evidence of record chronicled above.

According to the Federal Circuit's decision in Docket No. 2006-3425 (hereinafter, "Second Decision), "The Postal Service continued to refuse to restore him to duty, and in 2005 he appealed the Postal Service's latest such ruling to the Board . . . The Board properly concluded that Green's ensuing appeals to it were untimely because they were not filed within 30 days of the Postal Service's ruling." (App. 3). However, the panel misstated the facts.

It was undisputed below that the Postal Service never issued any "ruling" and there is absolutely no evidence in the record that suggests it did. Clearly, because the agency failed to issue any

"ruling" on Green's application for reemployment, it was impossible for him to file an appeal with the Board within 30 days of receipt, as required by 5 C.F.R. § 1201.22(b), of a decision that was never made or issued.

In addition, to support the conclusion that Docket No. 98-3349 was entitled to preclusive effect under the doctrine of *res judicata*, the Second Decision misstated the fact that the decision reached in Docket No. 98-3349 was a "final decision on the merits." (App. 6).

However, since the First Decision merely affirmed the Board's dismissal for lack of jurisdiction and it did not consider the merits of all claims, the court's decision in Docket No. 98-3349 was definitely not a final decision on the merits.

Accordingly, not only did the Federal Circuit decisions so far depart from the accepted, usual and required course of judicial proceeding as to call for an exercise of this Court's supervisory power, those decisions are prejudicial to the effective and expeditious administration of the business of the courts because they misstated the undisputed facts, disregarded the controlling law and they overlooked the harm done to Green's Constitutional right to substantive and procedural due process for the claims properly raised but not properly considered by the Board or the Federal Circuit.

IV. The Federal Circuit decision has sanctioned a decision by the Board that has so far departed from the accepted, usual and required course of administrative proceedings as to call for an exercise of this Court's supervisory power.

The Board's AJ initially acknowledged the Postal Service was required under the FECA to place Green on a priority reemployment list and to give him priority consideration for his former position or an equivalent one for which he qualified. (App. 44).

However, the AJ erred when he determined the Postal Service had discretion to set "reasonable" conditions on reemployment under 5 C.F.R. § 302.303(a)(2) and thereby to limit consideration of applicants with restoration rights under the FECA. (Id. and 47).

Under 5 C.F.R. § 302.303(a)(2):

> An agency may limit consideration granted at its discretion to applicants for specific positions or applicants who meet specific conditions, but must make those conditions a matter of record and must apply its policy uniformly to all eligible employees.

(5 C.F.R. § 302.303(a)(2) (emphasis added).

It is also noteworthy that the AJ did not determine whether the Postal Service's alleged policy was a matter of record.

Eventually, it was undisputed below that these so-called alleged standards and conditions did not and do not exist.

Moreover, clearly, a policy that only applies to the protected class of applicants with a history of disability is not applied uniformly to all eligible employees.

On the other hand, the Postal Service's obligation to place Green on its priority reemployment list for the position he left or an equivalent one is set forth in 5 C.F.R. §§ 302.303(a)**(1)** and (b)(3).

Under 5 C.F.R. 302.303(a)(1) and (b)(3), regarding agency obligations to fully recovered employees, an agency must put recovered employees with priority consideration on its priority reemployment list for the positions they left, or equivalent ones, and hire them when vacancies become available. (Raicovich v. USPS, 675 F.2d 417, 422 (Fed. Cir. 1982) (emphasis added).

Under 5 C.F.R. § 302.303(a)(1):

> An agency must establish a priority reemployment list whenever any applicants rated eligible under § 302.302 meet the conditions set out in paragraphs (b)(1) through (b)(3) of this section and must consider candidates from that list in accordance with § 302.304(a)(2).

(5 C.F.R. § 302.303(a)(1)).

Clearly, the agency did not have the discretion under 5 C.F.R. § 302.303(a)**(2)** to avoid what it was lawfully obligated to do under 5 C.F.R. § 302.303(a)**(1)**.

Moreover, agency discretion under 5 C.F.R. § 302.303(a)(2) does not apply to any applicant entitled to priority consideration because agencies do not grant consideration to those priority consideration applicants at their discretion, but rather because they are specially required to do so by law.

In this case, the Postal Service was required to provide priority consideration to Green under the FECA as set forth in 5 C.F.R. §§ 302.303(a)(1) and (b)(3). The Board's AJ, and later, the Federal Circuit, simply applied the wrong law.

Subsequently, Green timely filed Case No. SF-0353-05-977-I-1 with the Board on September 20, 2005 and alleged the Postal Service's continuing refusal to reemploy him improperly denied his priority consideration for reemployment under the FECA, as well as the VEOA.

In addition, based upon undisputed factual evidence and the Postal Service's failure to issue any decision regarding his 1998 application for reemployment, Green also alleged violations of the USERRA, illegal discrimination, retaliation for prior EEO activity, and harmful procedural errors.

Furthermore, because he reestablished his Federal employment through his own efforts in 2001 with the Internal Revenue Service ("IRS") but had not received the restoration of his rights and benefits

of employment, he also alleged improper restoration under 5 U.S.C. § 8151(a) and 5 C.F.R. § 353.304.

Prior to the January 2006 hearing, after having stated in 1998 that he did not consider, *inter alia*, whether the Postal Service unlawfully discriminated against Green and he erroneously dismissed the 1998 case for lack of jurisdiction, the same AJ of the Board summarily dismissed Green's 2005 claims on the basis of untimeliness or jurisdiction, with the exception of the USERRA claim. (App. 8 and 9).

For the limited hearing on the USERRA claim, the AJ again did not consider, *inter alia*, the pendant claims of illegal discrimination, retaliation for prior EEO protected activities and harmful procedural errors, and he denied the USERRA claim on the merits.

After Green filed a timely petition for review, the Board denied the petition but reopened the appeal on its own motion and modified the AJ's initial decision, still denying corrective action on the USERRA claim and still denying the VEOA claim. (App. 9 and 10).

The Board modified the AJ's decision by dismissing the restoration claim on the basis of *res judicata* due to the Federal Circuit's First Decision. (App. 14). Neither the AJ nor the Board made any express finding regarding the claim of improper restoration.

Green argued unsuccessfully that the Board made a clear and unmistakable error ("CUE") in 1998

when it found the Postal Service had the discretion to require him to submit to a second psychiatric examination after the OWCP had already determined he was fully recovered from his compensable injury and entitled to priority consideration for reemployment.

Furthermore, the laws covering the restoration to duty after recovering from a compensable injury under the FECA "do not permit an agency to circumvent the protections afforded by other laws to employees who face the involuntary loss of their positions." (5 C.F.R. § 353.105).

Federal employers, like the Postal Service, are prohibited from discriminating against disabled applicants by conducting medical examinations or making inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of his disability. (29 C.F.R. § 1630.13).

Under 29 C.F.R. § 1630.13:

> Pre-employment examinations or inquiry. Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(29 C.F.R. § 1630.13).

Accordingly, the Postal Service is also precluded by law from even questioning whether a former employee or any applicant with a history of disability is disabled at the time they apply for work.

Moreover, under regulations issued by the OPM, the Postal Service "may order a psychiatric examination **only when** (1) there is no physical explanation for an individual's behavior or actions which may affect safe and efficient performance or (2) a psychiatric examination is specifically called for in a position." (5 C.F.R. § 339.301(e)(1) (emphasis added). Neither of the two permissible justifications was even alleged in this case.

It is axiomatic that an employment action is not "reasonable in the circumstances" when it is prohibited by OPM and when it is discriminatory on its face against the protected class of individuals with a history of disability.

Indeed, even if the agency had the authority to determine if Green had a disability, the Postal Service would still be required by law to show that it could not accommodate any alleged disability. (29 C.F.R. § 1630.9).

However, neither the Board nor the Federal Circuit questioned whether the Postal Service could reasonably accommodate any alleged disability Green might have.

In regards to his USERRA and VEOA claims, Green contends he did not have a full and fair opportunity to litigate the merits of those claims because the Postal Service did not provide the information and documents required by the Board's regulations or the records required to be maintained by 5 C.F.R. § 353.105, and because the Board did not conduct a proper hearing for the VEOA claims.

In regards to the VEOA claims specifically, the Board found Green "identified an agency regulation that requires that preference eligible veterans who are placed on a reemployment priority list must be considered ahead of others on the list." (App. 20).

Because Green "made a nonfrivolous allegation that his veterans' preference rights were violated," he was entitled to a hearing on that issue. (Ferdon v. USPS, 60 M.S.P.R. 326, 329 (1994); Montoya v. USPS, 58 M.S.P.R. 104, 107 (1993)). However, the required hearing was not provided.

In addition, the Second Decision only discussed Green's rights as a preference eligible in terms of the Veterans' Preference Act in regards to his VEOA claims. However, Green identified other statutes and laws before the Board concerning his rights as a preference eligible veteran but, without a hearing, he was not provided with a proper forum or opportunity to develop the necessary evidence of record.

CONCLUSION

As the Secretary of Labor's designee, 5 U.S.C. § 8145 of the FECA provides the OWCP with exclusive jurisdiction to administer the rights and benefits established in the FECA and to decide all questions arising there under.

In addition, under 5 U.S.C. § 8128(b) of the FECA, the OWCP's action "in allowing or denying a payment . . . is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official

of the United States or by a court by mandamus or otherwise." (5 U.S.C. § 8128(b)).

Moreover, under 5 U.S.C. §§ 8149, only the OWCP can determine the "the nature and extent of the proof and evidence required" under the FECA. (5 U.S.C. § 8149).

One of the most important benefits established in the FECA is the right of injured Federal employees to be restored to their former positions when they fully recover from their compensable injuries.

In 1998, the OWCP determined Green fully recovered from his compensable injury and that he was entitled to priority consideration for reemployment.

The Postal Service, the Board and the Federal Circuit all acted outside their sphere of authority when they chose to review the propriety of OWCP's determination that Green fully recovered from his compensable injury instead of deferring to OWCP or referring any legitimate medical concerns to OWCP for resolution.

For over eight years, Green's FECA restoration rights have been clearly violated and his Constitutional right to due process violated because the Postal Service, the Board and the Federal Circuit all failed to follow their own rules, procedures and precedents. Furthermore, the Postal Service also violated other laws with impunity.

No other Federal employee in good standing, separated due to a compensable injury, should be subjected to similar unconscionable actions as those taken by the Postal Service, in violation of its own regulations, against Green.

The Postal Service should be ordered to restore Green to his former position or an equivalent one effective January 7, 1994, with all rights and benefits of employment he would have had had he not been injured.

The remaining claims of illegal discrimination, retaliation for protected activity and harmful procedural errors should be remanded to the Board for a hearing and a final decision on the merits.

For these reasons, this petition for a writ of certiorari should be GRANTED.

RESPECTFULLY SUMITTED this 24th day of December, 2007.

Ronald L. Green,
Petitioner, *In Pro Se*
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(702) 435-4584

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

2006-3425

RONALD L. GREEN,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

DECIDED: May 11, 2007

Before LOURIE, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and SCHALL, *Circuit Judge*.

PER CURIAM.

This is yet another chapter in the protracted saga of the petitioner Ronald L. Green's unsuccessful attempts to require the United States Postal Service ("Postal Service") to rehire him, following his alleged recovery from the disability that led to the termination of his employment. The story includes three trips to this court, one to the Ninth Circuit and several to the Merit Systems Protection Board ("Board"), and his filing of two district court suits against the Postal Service. *Green v. Pottter* [sic], CV-S-00-0155-LRH (RJJ) (D. Nev. 2002) (order consolidating Green's two suits and granting Potter, the Postmaster General, summary

judgment), *aff'd Green v. Potter,* 70 Fed. Appx. 976 (9th Cir. 2003). In the present case, we reject Green's numerous challenges to the Board's latest decision that rejected his challenges to the Postal Service's action, and affirm the Board.

I

In January, 1994, Green was separated from his job with the Postal Service because he had a form of depression that disabled him from performing his duties, and began receiving disability compensation. Thereafter he contended that his disability had terminated and that the Postal Service improperly had refused to reinstate him. The Board dismissed his two appeals, and this court affirmed both dismissals. *Green v. U.S. Postal Serv.,* MSBP Docket No. DE-0752-95-0041-I-1 (Initial Decision, February 23, 1995), *aff'd Green v. U.S. Postal Serv.,* 78 F.3d 602, 1996 WL 39683 (Fed. Cir. 1996) (Table) ("*Green I*"); *Green v. U.S. Postal Serv.,* MSPB Docket No. SF-0353-98-0034-I-1 (Initial Decision, Oct. 31 1997), *aff'd Green v. Merit Sys. Protection Bd.,* 194 F.3d 1330, 1999 WL 132219 (Fed. Cir. 1999) (Table) ("*Green II*").

In December, 1997, the Office of Workers' Compensation Programs terminated Green's compensation benefits because he had fully recovered. In January, 1998, he filed with the Postal Service another request for restoration to duty, and a Department of Veteran Affairs' psychiatrist advised the

Postal Service that Green was free of mental illness. *Green v. U.S. Postal Serv.,* 194 F.3d 1330, 1999 WL 127499, at *1 (Fed. Cir. 1999) (Table) (*"Green III"*), *cert. denied,* 528 U.S. 912 (1999). A series of administrative disputes with the Postal Service followed, which culminated in the Postal Service scheduling an appointment for him with a psychiatrist. When Green failed to keep that appointment, apparently on the ground that he believed it was unnecessary, the Postal Service stopped considering him for reemployment. We sustained the Postal Service's action as reasonable. *Id.* at *2.

Green underwent further psychiatric examinations, which produced disagreement among the doctors over whether he was able to return to work. The Postal Service continued to refuse to restore him to duty, and in 2005 he appealed the Postal Service's latest such ruling to the Board.

The full Board affirmed and modified the administrative judge's initial decision (rendered after an evidentiary hearing on one of Green's contentions) rejecting Green's challenges to the Postal Service's refusal to reinstate him. The Board rejected Green's contention that the Postal Service had violated the Uniformed Services Employment Rights Act of 1994 and the Veteran's Employment Opportunities Act of 1998. It ruled that his challenge to the Postal Service's failure to reemploy him in 1998 was barred by *res judicata* and untimeliness.

II

Green presents a potpourri of challenges to the Postal Service's refusal to reemploy him and the Board's affirmance of those actions. We have considered but have rejected all of these contentions. Only four of them warrant any discussion, and those but briefly.

A. Green contends that the Postal Service's refusal to reemploy him violated two federal statutes. One was the Uniform Services Employment Rights Act of 1998, 38 U.S.C. § 4311, under which a veteran claiming discrimination in employment must show that his military status was "a 'motivating factor'" in the Agency's employment action against him. *Sheehan v. Dep't of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir. 2001). Green has shown nothing that even suggests, let alone establishes, that his military service (completed more than twenty years earlier) had anything to do with the Postal Service's refusal to rehire him. In these circumstances, the Board's administrative judge did not abuse his broad discretion over the admission of evidence in refusing to permit Green to testify on his claim under this statute.

The other statute was the Veterans Preference Act, which, in conjunction with Postal Service's Employee and Labor Relations Manual ("ELM"), requires the Postal Service to give a veteran a preference in employment when he recovers from a compensable injury more than a year after his disability compensation began. ELM § 546.131. An implementing

regulation, 5 C.F.R. § 353.301(b), requires that to obtain such priority the veteran must request employment within 30 days of the cessation of compensation benefits. Although Green initially complied with that requirement by requesting reemployment within 30 days after he ceased receiving benefits on December 15, 1997, those proceedings terminated when the Postal Service stopped considering his application, because Green had failed to appear for his scheduled psychiatric examination – an action this court upheld as reasonable. *Green III* at *2, 5.

The Veterans Preference Act request requirement is subject to the Board's general regulatory requirement that "a restoration appeal must be filed within 30 days after the effective date of the action being appealed or 30 days after the date of receipt of the agency's decision, whichever is later," 5 C.F.R. § 1201.22(b), "unless the appellant demonstrates good cause for the delay." *Id.* § 1201.22(c). The Board properly concluded that Green's ensuing appeals to it were untimely because they were not filed within 30 days of the Postal Service's rulings he was challenging, and that he had not shown the requisite good cause.

B. Green challenges the Postal Service's refusal to reinstate him in 1998. The Board correctly held that our 1999 decision upholding that action was *res judicata* of this claim, and required its rejection. This case satisfied the three requirements for *res judicata* set forth in *International Air Response v. United States*, 302 F.3d 1363, 1368 (Fed. Cir. 2002); (1) the

parties in this case and the earlier one are identical; (2) the previous decision was a final judgment on the merits; and (3) the present claim is based on the same set of transactional facts as the claim previously adjudicated, *i.e.,* the Postal Service's refusal to reemploy him. *Green III* at *3; *see also, Spruill v. Merit Sys. Protection Bd.*, 978 F.2d 679, 686 (Fed. Cir. 1992) (dismissal for failure to state a claim is a decision on the merits).

C. Green contends that the Postal Service exceeded its authority when in 1998 it undertook independently to determine whether Green was qualified to return to work, after the Office of Workers' Compensation Programs terminated his disability compensation upon ruling that his disability had terminated. Green relies upon 5 U.S.C. § 8128(b), which provides that the action of the Secretary of Labor or his designatee (in this case the Office of Workers' Compensation Programs), "in awarding or denying [disability] payment" "is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." These provisions, however, preclude review of the Secretary's allowance or denial of disability payments – here the termination of Green's disability payments. They do not preclude the Postal Service from itself determining whether a disabled former employee whose disability payments have been terminated is qualified to return to work. *Cf. Minor v. Merit Sys. Protection Bd.*, 819 F.2d 280,

283 (Fed. Cir. 1987) ("a decision of OWCP or the Employees' Compensation Appeal Board 'does not bind' the MSPB acting within its own separate statutory sphere of deciding the propriety of restoration"); *Nat'l Assoc. of Letter Carriers v. U.S. Postal Serv.*, 272 F.3d 182 (3d Cir. 2001) (holding that the arbitrator of an employee's wrongful termination claim was not bound by the factual conclusions made by the Office of Workers' Compensation).

CONCLUSION

The decision of the Board is

AFFIRMED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 266

Docket No. SF-0353-05-0977-I-1

Ronald L. Green,

Appellant,

v.

United States Postal Service, Agency.

September 5, 2006

Ronald L. Green, Henderson, Nevada, pro se.

Corrine H. Lee, Esquire, San Francisco, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that denied on the merits his Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim and dismissed his denial of restoration and Veterans Employment

Opportunities Act of 1998 (VEOA) claims. For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on the Board's own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DENYING corrective action on the USERRA claim and DISMISSING the appellant's restoration and VEOA claims.

BACKGROUND

¶2 The appellant was a preference-eligible PS-05 Maintenance/Tool Clerk at the agency's Las Vegas Processing and Distribution Center in Las Vegas, Nevada, who began receiving Office of Workers' Compensation Programs (OWCP) benefits in 1994. Initial Appeal File (IAF), Tab 1, Appellant Exhibit (App. Ex.) B-5. He requested restoration as a fully recovered employee in January, 1998, and, when the agency did not restore him, he filed an appeal with the Board on February 28, 1998. Specifically, he contended that the agency had effectively denied him priority consideration by improperly requiring him to submit to additional medical and psychiatric evaluations as a condition of his reemployment. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction. *Green v. U.S. Postal Service,* MSPB Docket No. SF-0353-98-0372-I-1 (Initial Decision, June 19, 1998), *aff'd,* 194 F.3d 1330 (Fed. Cir. 1999) (Table), No. 98-3349, 1999 WL 127499, *cert. denied,* 528 U.S. 938 (1999). On petition to the Court of Appeals for the Federal Circuit, the court determined

that the Board had jurisdiction over the appeal and that, under the circumstances, the agency did not abuse its discretion by requiring an employee claiming recovery from a significant mental illness to submit to an independent psychiatric evaluation to ensure that he meets the criteria for reemployment. *Green,* 1999 WL 127499, at **5.

¶3 The appellant filed the instant appeal on September 20, 2005, following his receipt of a closure letter for a VEOA complaint from the Department of Labor (DOL). In this appeal, he raised allegations of failure to restore following recovery from a compensable injury, violations of USERRA, and violations of VEOA. IAF, Tab 1. After ordering the appellant to establish that his claims were timely and within the Board's jurisdiction, the AJ conducted a hearing on the appellant's USERRA claim alone. IAF, Tabs 2, 8, 19. In the initial decision, the AJ denied the appellant's USERRA claim on the merits. IAF, Tab 23, Initial Decision (ID) at 19-20. He dismissed, for lack of Board jurisdiction under the doctrine of collateral estoppel, the appellant's attempt to relitigate issues raised in his February 1998 appeal. ID at 10. The AJ dismissed as untimely the appellant's allegations of a subsequent continuing denial of restoration, after September 2000. ID at 11. The AJ also dismissed, for lack of jurisdiction, the appellant's VEOA claim because he had failed to allege any violation of a statute or regulation relating to veterans' preference. ID at 16-17.

¶4 The appellant has filed a petition for review of the initial decision, and the agency has filed a response to the appellant's petition. Petition for Review File (PFRF), Tabs 1, 3.

ANALYSIS

The AJ properly denied the appellant's USERRA claim on the basis that he failed to show that military status was a substantial or motivating factor.

¶5 In USERRA actions, there must be an initial showing by the employee, by preponderant evidence, that military status was at least a motivating or substantial factor in the agency action, upon which the agency must then prove, by a preponderance of the evidence, that the action would have been taken for a valid reason despite the protected status. *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir. 2001).

¶6 In this case, the AJ denied the appellant's USERRA claim on the basis that he failed to meet his burden of showing that his military service was a substantial or motivating factor in the agency's failure to restore him to duty. ID at 19-20. The AJ noted that the record shows that the appellant completed his military service in 1977, and the agency denied his request for reemployment more than 20 years later. ID at 18. In addition, the agency's denial of reemployment was based on the appellant's psychological illness, which he and his physicians attributed

to mistreatment during his employment with the agency. ID at 19. The AJ further noted that the appellant's service-connected disability is based on hemorrhoids, and there is no reference anywhere in the record to this condition being a factor in the appellant's requests for reemployment or the agency's response thereto.* *Id.* The AJ also stated that the appellant has not identified any non-veteran who was hired in his stead, and he has not alleged any facts that would tend to show any hostility toward veterans by the agency officials who responded to his restoration request. *Id.* Finally, the AJ observed that the appellant's USERRA claim relied solely on the alleged weakness of the agency's proffered reason for denying his reemployment request. *Id.*

¶7 On PFR, the appellant contends that the AJ improperly denied him an opportunity to present relevant and material evidence on this claim. In particular, the appellant contends that the AJ improperly denied his request to testify. PFRF, Tab 1, ¶ 2D. The appellant proffers that he would have testified regarding relevant communications between the Department of Veterans Affairs (VA) and the agency regarding the agency's inquiries concerning

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* We note that the appellant's service-connected disabilities actually appear to be hypertension and hemorrhoids. IAF, Tab 4, App. Ex. S4. However, this minor oversight does not affect the AJ's analysis that the appellant's military-connected disabling conditions were not a factor in the agency's failure to reemploy him.

the appellant's VA certified and service-connected disabilities, the VA's response, and the agency's reasons for making these inquiries. *Id.*

¶8 The record shows that the AJ properly denied the appellant's request to testify because it was untimely, vague, and not shown to be relevant to his claim of military status discrimination. IAF, Tab 21 at 2-3; *see Brewer v. Department of the Interior,* 76 M.S.P.R. 363, 368 (1997) (an AJ has wide discretion to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious). On PFR, the appellant has failed to show that the AJ abused his discretion in making these rulings. In particular, the appellant has failed to make a detailed proffer showing that he would have testified on an issue relevant and material to his USERRA claim. Furthermore, having reviewed the record before us, we conclude that the AJ's determination, that the appellant failed to show that discrimination based on military status was a substantial or motivating factor, was based on substantial evidence. Accordingly, we affirm the AJ's denial of the appellant's USERRA claim.

The appellant's attempts to relitigate the agency's denial of his 1998 request for restoration is dismissed on the basis of res judicata.

¶9 When the appellant requested restoration in 1998, the agency informed him that he must first submit to an examination by Norton A. Roitman,

M.D. It is this requirement that the court found to be reasonable in its March 9, 1999 decision. In this appeal, the AJ found that the appellant was collaterally estopped from raising this issue. The doctrines of res judicata and collateral estoppel are closely related doctrines that both concern the preclusive effects of a prior adjudication and are based on similar policy concerns – to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Peartree v. U.S. Postal Service,* 66 M.S.P.R. 332, 336-37 (1995) (quoting *Allen v. McCurry,* 449 U.S. 90, 94 (1980)). The doctrine of collateral estoppel is distinguished from the doctrine of res judicata in that res judicata, which refers to claim preclusion, applies only to subsequent cases involving the same parties or their privies and the same cause of action; while collateral estoppel, which pertains to issue preclusion, does not require the same parties or the same cause of action. *Payer v. Department of the Army,* 19 M.S.P.R. 534, 536 n.2 (1984).

¶10 Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Peartree,* 66 M.S.P.R. at 337. Collateral estoppel is appropriate when (1) an issue is identical

to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party against whom claim preclusion is sought had a full and fair opportunity to litigate the action in the prior action, either as a party to the earlier action or as one whose interests were fully represented in the that action. *McNeil v. Department of Defense,* 100 M.S.P.R. 146, ¶ 15 (2005). In this appeal, we find that the appellant's attempts to relitigate issues resolved in his 1998 appeal are precluded by the doctrine of res judicata. The court's prior decision was a final judgment on the merits by a forum of competent jurisdiction. Furthermore, both cases involve the same parties and concern the same cause of action, i.e., the agency's denial of restoration in 1998 following the appellant's recovery from a compensable injury. Thus, all of the elements for res judicata have been met.

¶11 The appellant contends, on PFR, that the AJ's application of collateral estoppel was erroneous because his 1998 appeal was dismissed without prejudice and was not a final decision. PFRF, Tab 1, ¶¶ 4B, 4C. We disagree. First, it was another, earlier appeal that was dismissed without prejudice. *Green v. U.S. Postal Service,* MSPB Docket No. SF-0353-98-0034-I-1 (Initial Decision, Oct. 31, 1997). Second, in this appeal, the decision entitled to preclusive effect is the court's 1999 decision, which affirmed the agency's refusal to afford the appellant priority

consideration in 1998 because he would not submit to a second psychiatric examination.

¶12 Although more properly based on res judicata rather than collateral estoppel, the dismissal of the appellant's claims related to his original January 1998 request for restoration was proper. We find, though, that the AJ erred by categorizing the dismissal as jurisdictional. ID at 10. Generally, the doctrines of res judicata and collateral estoppel are bases to dismiss an appeal over which the Board has jurisdiction, but are not grounds on which to dismiss an appeal for lack of jurisdiction. *Mycka v. Office of Personnel Management,* 56 M.S.P.R. 675, 679 (1993). In any event, these errors are harmless because dismissal of the issue of the appellant's right to restoration in 1998 on preclusion grounds was still appropriate in this case. We therefore dismiss the appellant's attempt to relitigate issues raised in his 1998 appeal on the basis of res judicata.

The allegations of subsequent denials of restoration are untimely.

¶13 As with any Board appeal, a restoration appeal must be filed with the Board within 30 days after the effective date of the action being appealed or 30 days after the date of receipt of the agency's decision, whichever is later. *See* 5 C.F.R. § 1201.22(b); *Fisher v. U.S. Postal Service,* 100 M.S.P.R. 94, ¶ 12 (2005). If an appellant fails to present his appeal within that timeframe, it will be dismissed as untimely filed

unless good reason for the delay is demonstrated. 5 C.F.R. § 1201.22(c). The appellant bears the burden of proof with regard to timeliness, which must be established by a preponderance of the evidence. *Fisher,* 100 M.S.P.R. 94, ¶ 12.

¶14 The record shows that the appellant eventually submitted to an examination by Dr. Roitman who recommended on December 16, 1999, that the agency reemploy the appellant only if a "psychological evaluation and testing by a practitioner who is truly independent finds evidence to refute [Dr. Roitman's] finding of personality pathology" or if the appellant obtained "treatment specific to his psychological problem." IAF, Tab 4, App. Ex. T. After the appellant's attorney requested that the agency comply with Dr. Roitman's recommendation, the agency responded in a June 27, 2000 letter from David Bachman, M.D., advising the appellant that it was his responsibility to secure the independent psychological testing to show that he could return to work. *Id.,* App. Ex. U. In September 2000, the appellant submitted an evaluation from Marv Glovinsky, Ph.D., in which he found that there was no reason why the appellant should not be reemployed. *Id.,* App. Ex. V. Meanwhile, the appellant pursued a remedy through Equal Employment Opportunity complaints and suits in district court alleging that the agency's failure to restore him was the result of discrimination. The appellant has argued below in this appeal and on PFR that the agency engaged in a continuing denial of his requests

for restoration which has been ongoing from December 1999 to the present time.

¶15 The appellant has failed to show that his appeal was timely or that good cause existed for his delay in filing his appeal of these putative denials of restoration. The appellant argues that the 30-day time limit for filing an appeal never began to run because the agency never issued a final decision that informed him of his right to file an appeal. PFRF, Tab 1 at ¶¶ 4C, 4D, 4E. Citing *Shiflett v. U.S. Postal Service*, 839 F.2d 669 (Fed. Cir. 1988), the appellant asserts that the failure of the agency to issue a final decision notifying him of his Board appeal rights was a "flagrant violation" of the regulations and established good cause for his delay in filing this appeal. PFRF, Tab 1, ¶ 4D. *Shiflett,* however, does not reflect the language of the pertinent regulation during the relevant timeframe. In particular, although the regulation requires an agency to inform an appellant of his rights, obligations, and benefits with respect to a denial of restoration, including appeal rights, the version of that regulation in effect from at least 1996 to the present also states that, regardless of notification, an employee is required to exercise due diligence in ascertaining his rights and seeking reemployment. 5 C.F.R. § 353.104.

¶16 Here, the appellant did not exercise due diligence because he waited nearly five years after receiving Dr. Glovinsky's favorable evaluation before filing an appeal with the Board. Additionally, given the appellant's extensive history in litigating these

claims, he cannot credibly contend that he was unaware of the requirement to timely file a Board appeal or to demonstrate good cause for any delay. *See Fisher*, 100 M.S.P.R. 94, ¶¶ 12-13. The appellant thus failed to show any error in the AJ's dismissal of portions of his restoration appeal as untimely filed without good cause being shown.

The VEOA claim is dismissed for failure to state a claim upon which relief can be granted.

¶17 As noted above, the AJ dismissed on jurisdictional grounds the appellant's claim that the agency has violated his rights to veterans' preference under the VEOA by its failure to restore him to duty. ID at 14-17. An AJ may dismiss a VEOA claim for lack of jurisdiction only when an appellant fails to meet one or more of the VEOA's jurisdictional requirements. *Waddell v. U.S. Postal Service*, 94 M.S.P.R. 411, ¶ 9 (2003). To establish Board jurisdiction over an appeal brought under the VEOA, an appellant must (1) show that he exhausted his remedy with the DOL and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of the VEOA, (ii) the actions at issue took place on or after the October 30, 1998 enactment date of the VEOA, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a; *Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377, ¶¶ 6, 8 (2003). However, an appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a

VEOA claim. *See Wooten v. Department of Veterans Affairs*, 96 M.S.P.R. 671, ¶¶ 6, 11 (2004); *Waddell,* 94 M.S.P.R. 411, ¶ 9. In addition, an appellant's claims of violation of his veterans' preference rights should be liberally construed. *See Abrahamsen,* 94 M.S.P.R. 377, ¶ 9; *Young v. Federal Mediation & Conciliation Service,* 93 M.S.P.R. 99, ¶¶ 6-7 (2002), *aff'd,* 66 F. App'x 858 (Fed. Cir. 2003).

¶18 In this case, the AJ determined that the appellant is a preference eligible who alleged, in part, that the agency violated his veterans' preference rights under the VEOA by denying him restoration following a compensable injury, and that he had exhausted the DOL complaint procedure. ID at 14. The AJ dismissed the appeal for lack of jurisdiction on the basis that the appellant had not alleged a violation of any statute or regulation relating to veterans' preference that bears on the question that he presented to DOL and the Board. ID at 16-17.

¶19 The appellant, however, identified an agency regulation that requires that preference eligible veterans who are placed on a reemployment priority list must be considered ahead of others on the list. IAF, Tab 4 at 37. Based on this assertion, we find that the appellant made a nonfrivolous allegation that his veterans' preference rights were violated. Accordingly, the AJ erred in dismissing the appellant's VEOA claim on this basis. Nevertheless, because the appellant has failed to state a claim upon which relief can be granted, the AJ's dismissal for lack of jurisdiction has not prejudiced his substantive rights.

¶20 The appellant bears the burden of proof to establish that the agency violated his veterans' preference rights. In this appeal, that burden includes proving that he was entitled to restoration, i.e., priority consideration for a vacant position. In other words, under the circumstances of this appeal, the appellant must be able to establish that he is entitled to receive priority consideration as a fully recovered employee in order to state a VEOA claim.

¶21 Under 5 C.F.R. § 353.301(b), an employee who recovers from a compensable injury more than one year from the date of the injury is entitled to priority consideration agencywide for restoration to the position he left or an equivalent one, "*provided he [] applies for reappointment within 30 days of the cessation of compensation.*" 5 C.F.R. § 353.301(b) (emphasis supplied.) Here, it is undisputed that the appellant recovered more than one year from the date of injury. While the Federal Circuit found that the appellant was entitled to priority consideration after his timely 1998 restoration request, it found that he did not meet the agency's reasonable requirement for reemployment that he submit to a psychiatric evaluation. *Green,* 194 F. 3d at **5. Moreover, whether a subsequent request for restoration is considered to have been made when the appellant submitted to the examination by Dr. Roitman, when his attorney sent the letter making an inquiry sometime before June 2000, or when the appellant submitted the evaluation from Dr. Glovinsky in September 2000, such a request came long after the time limit of 30 days from

the December 15, 1997, cessation of compensation. The time the appellant was challenging the AJ's decision before the Court of Appeals for the Federal Circuit and the Supreme Court, and also litigating the agency's actions in district court and the Court of Appeals for the Ninth Circuit, does not toll the time limit for making a request for restoration. The appellant has failed to allege any facts to support this element of his claim that he made a timely request for restoration within 30 days of full recovery from his compensable injury. Accordingly, he has failed to state a claim upon which relief may be granted.

The appellant has failed to meet his burden of showing that the AJ was biased against him.

¶22 Finally, the appellant asserts that the AJ was biased against him as evidenced by the facts he chose to include in the initial decision's Background and in his insensitive and erroneous discussion of the appellant's service-connected disability. PFRF, Tab 1, ¶ 6A. The appellant also asserts that the AJ erroneously denied his request for certification of an interlocutory appeal, which was based on the AJ's alleged bias. *Id.*; IAF, Tabs 14, 15.

¶23 In making a claim of bias or prejudice against an AJ, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation,* 1 M.S.P.R. 382, 386 (1980). Further, an AJ's conduct during the course of a Board proceeding

warrants a new adjudication only if the AJ's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army,* 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (*quoting Liteky v. United States,* 510 U.S. 540, 555 (1994)), *cert. denied,* 537 U.S. 1020 (2002).

¶24 In this case, the appellant's claim of bias is derived from the AJ's sua sponte identification of several issues in this appeal and the appellant's disagreement with the initial decision. The appellant's argument fails to overcome the presumption of honesty and integrity to be afforded an AJ.

ORDER

¶25 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and Forms *5*, *6*, and *11*.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

RONALD L. GREEN, Petitioner, v.
UNITED STATES POSTAL SERVICE, Respondent.

98-3349

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

1999 U.S. App. LEXIS 3748

March 9, 1999, Decided

NOTICE:

RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Rehearing Denied May 4, 1999, Reported at: *1999 U.S. App. LEXIS 10825.* Reported in Table Case Format at: *1999 U.S. App. LEXIS 33367.*

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner sought review of a final decision of the Merit Systems Protection Board, which dismissed his appeal for lack of subject matter jurisdiction. In the appeal, petitioner had alleged that his former employer, respondent United States Postal Service, effectively denied him priority consideration as required by 5 C.F.R. § 353.301(b).

OVERVIEW: The court upheld a decision of the Merit Systems Protection Board rejecting petitioner's appeal even though it was error for the board to dismiss the appeal for lack of subject matter jurisdiction. In the appeal, petitioner alleged that respondent United States Postal Service, his former employer, had effectively denied him priority consideration for reemployment as required by 5 C.F.R. § 353.301(b) after his recovery from a compensable disabling mental condition. Respondent had insisted that its psychiatrist examine petitioner, but petitioner refused. The board erred by confusing the question of subject matter jurisdiction with the question of entitlement to relief. It would have been more accurate to conclude that petitioner failed to prove the necessary elements of his nonfrivolous claim. Nevertheless, this error was harmless because the administrative judge properly made his factual findings and properly held that petitioner failed to prove the necessary elements of his claim. Specifically, respondent met its burden of demonstrating that its actions were reasonable under the circumstances, consistent with its normal practice, and within its discretion.

OUTCOME: The court upheld a decision of the Merit Systems Protection Board dismissing petitioner's appeal alleging that respondent United States Postal Service had denied him priority consideration for reemployment, because the board's dismissal of the appeal for lack of subject matter jurisdiction was harmless error. The administrative

judge otherwise properly held that petitioner failed to prove the necessary elements of his claim.

CORE TERMS: reemployment, psychiatric evaluation, subject matter jurisdiction, specialist, undergo, dysthymic, disorder, regulation, physical examination, drug testing, psychiatrist, objected, entitled to priority, credibility, failed to prove, mental illness, restoration, scheduled, harmless, protest, substantial evidence, second guess, nonfrivolous, pertaining, appealable, psychiatric examination, entitlement to relief, final decision, urine sample, asking

CORE CONCEPTS –

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Federal Government: Employees & Officials

The court's statutorily prescribed standard of review allows it to reverse a decision of the Merit Systems Protection Board (Board) only if it was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. Whether the Board has jurisdiction to adjudicate an appeal is a question of law, which the court reviews de novo. Further, the Board's jurisdiction is not plenary, but is limited to actions made appealable to it by law, rule or regulation.

Workers' Compensation & SSDI: Remedies Under Other Statutes: Federal Employee's Compensation Act. *See* 5 C.F.R.§ 302.501.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Federal Government: Employees & Officials

When a nonfrivolous claim for relief has been asserted before the Merit Systems Protection Board (Board), and the outcome is determined by whether the facts support that claim, a decision by the Board that they do not is a failure to prove the claim, not a lack of jurisdiction in the Board.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Federal Government: Employees & Officials

On appeal, the petitioner bears the burden of establishing that the Merit Systems Protection Board (Board) lacked substantial evidence to support its factual findings. In so doing, credibility determinations made by the Board are virtually unreviewable and the court does not second guess management decisions of an agency.

Workers' Compensation & SSDI: Remedies Under Other Statutes: Federal Employee's Compensation Act. *See* 5 U.S.C.S.§ 8151 (b)(2).

Workers' Compensation & SSDI: Remedies Under Other Statutes: Federal Employee's Compensation Act. *See* 5 C.F.R.§ 302.303.

JUDGES: Before MICHEL, RADER, and GAJARSA, Circuit Judges.

OPINION:
PER CURIAM.

DECISION

Ronald L. Green petitions for review of a final decision of the Merit Systems Protection Board (the "Board"), Green v. United States Postal Service, Docket No. SF-0353-98-0372-I-1, dismissing his appeal for lack of subject matter jurisdiction. While we discern error in the Board's dismissal of Green's appeal for lack of subject matter jurisdiction, we hold the error was harmless because he failed to prove entitlement to relief and we therefore affirm.

BACKGROUND

From January 1986 to January 1994, Green was employed by the United States Postal Service in Las Vegas, Nevada, as a maintenance control and stock clerk. Effective January 7, 1994, Mr. Green was removed from this position due to a compensable disabling condition, dysthymic disorder (a form of depression). His compensation benefits began on or before April 14, 1994 and ceased on December 15, 1997. Green's compensation benefits were terminated

by the Department of Labor's Office of Workers' Compensation Program ("OWCP") based upon a November 14, 1997 report of Dr. Zielinski, a licensed clinical psychologist for the Department of Veterans Affairs, stating that Green had recovered from dysthymic disorder. On December 15, 1997, the Postal Service notified Green by letter that his rights to reemployment, after being separated due to a disability, are contained in section 546 of the Postal Service's Employee and Labor Relations Manual. On January 2, 1998, Green timely requested priority consideration for reemployment with the Postal Service under 5 C.F.R. § 353.301(b) (1998), pertaining to full recovery more than one year after compensation began.

On February 12, 1998, Dr. Charles Van Valkenburg, a psychiatrist for the Department of Veterans Affairs, reported to the Postal Service that Green was no longer suffering from dysthymic disorder and was free of other mental illness. On February, 24, 1998, the Postal Service informed Green by letter that he needed to complete a PS Form 2591, "Application for Employment," prior to consideration of his request for reemployment. On February 28, 1998 Green advised the Postal Service that he believed they were unnecessarily delaying his restoration to employment and he requested that the Postal Service inform him what rules, regulations or guidelines required the completion of the PS Form 2591 in connection with his request for reemployment. On March 4, 1998, in reply to Green's objection, an official of the Postal Service

stated that when considering all requests for reemployment the applicants were required to complete and submit PS Form 2591, but that he would accept an updated, or continuation, of the PS Form 2591 which Green had filled out when he first began working for the Postal Service. Green objected to the referenced action because the Postal Service did not advise Green of any rule, regulation or guideline that required the completion of PS Form 2591 in connection with his request for reemployment. Nevertheless, on March 7, 1998 Green submitted the completed PS Form 2591 to the Postal Service under protest.

By a March 11, 1998 letter, the Postal Service informed Green that it requires all applicants for employment to provide a urine sample for drug testing and that pursuant to this he was scheduled to provide a urine sample for drug testing on March 16, 1998. Green again objected for the same reason stated above, but nevertheless agreed to take the test under protest. Green passed the urinalysis drug testing and thus qualified for further reemployment consideration.

On April 3, 1998, the Postal Service informed Green that he was scheduled for a physical examination on April 6, 1998. Green objected for the same reason stated above, but submitted to the examination under protest. Dr. Collet, the examining physician, advised Green that the physical examination seemed fine to him, but that Green needed to undergo a psychiatric evaluation by a specialist.

By an April 17, 1998 letter, the Postal Service informed Green that, in accordance with Dr. Collet's request, they had scheduled an appointment for him with Dr. Roitman, a psychiatrist, for April 27, 1998. Green again objected and informed the Postal Service by letter dated April 25, 1998 that he would not appear for the appointment with Dr. Roitman. On May 11, 1998, Dr. Van Valkenburg reported that he had examined Green and found that he no longer suffered from dysthymic disorder. Green did not present himself for the April 27, 1998 psychiatric examination with Dr. Roitman and was not further considered by the Postal Service for reemployment.

On February 28, 1998, Green filed an appeal with the Board alleging that the Postal Service had effectively denied priority consideration as required by 5 C.F.R. § 353.301(b), by requiring that he submit to medical and psychiatric evaluations as a condition of his reemployment.[1] The Board held that Green did not establish that any appealable action occurred and

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[1] We note that Green filed the appeal with the Board on February 28, 1998 after the Postal Service informed him by letter that he needed to complete a PS Form 2591 prior to consideration of his request for reemployment, but before all other requests were made by the Postal Service. In any event, at a hearing on June 4, 1998, the Administrative Judge ("AJ") heard Green's arguments pertaining to all of the Postal Service's requests, including the April 17, 1998 letter requesting Green to meet with Dr. Roitman for a psychiatric exam, and considered them in making his final decision.

dismissed the appeal for lack of subject matter jurisdiction.

DISCUSSION

We have jurisdiction to hear this appeal under 28 U.S.C. § 1295(a)(9) (1994). Our statutorily prescribed standard of review allows us to reverse a decision of the Board only if it was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994). Whether the Board has jurisdiction to adjudicate an appeal is a question of law, which we review *de novo*. *See Forest v. Merit Sys. Protection Bd.*, 47 F.3d 409, 410 (Fed. Cir.1995) (citing *Vesser v. Office of Personnel Management*, 29 F.3d 600, 603 (Fed. Cir. 1994)).

The Board's jurisdiction is not plenary, but is limited to actions made appealable to it by law, rule or regulation. *See* 5 U.S.C. § 1204 (1994); *Minor v. Merit Sys. Protection Bd.*, 819 F.2d 280, 282 (Fed. Cir.1987). One such regulation granting the Board jurisdiction is 5 C.F.R. § 302.501 (1998), which states that:

> An individual who is covered by 5 U.S.C. 8101(1) and is entitled to priority consideration under part 302 may appeal a violation of his/her restoration rights to the [Board] under the provisions of the Board's regulations by presenting factual information that he or she was denied restoration rights because of the employment of another person.

It is not in dispute that Green is covered by 5 U.S.C. § 8101(1) (1994) or that he is entitled to priority consideration. Nor is it disputed that from January 1998 to June 1998, the Postal Service employed others in positions for which it might have selected Green, had it not required that he submit to further psychiatric evaluation. Green, however, disputes the determination that, because he did not submit to such evaluation in connection with his reemployment, the Board lacked subject matter jurisdiction. Green argues that in considering this issue, the Board confused the question of subject matter jurisdiction with the question of entitlement to relief. We agree.

We conclude that when the Board dismissed for lack of subject matter jurisdiction it obscured the nature of the defect in Green's appeal. It would have been more accurate to conclude that Green failed to prove the necessary elements of his cause. The Board must determine whether subject matter jurisdiction existed, as long as Green asserted nonfrivolous claims, which we hold he did. *See Spruill v. Merit Sys. Protection Bd.*, 978 F.2d 679, 687 (Fed. Cir. 1992). We recognize, moreover, that this is a case in which the facts that establish jurisdiction are intertwined with the facts that determine the merits. Thus, "when a nonfrivolous claim for relief has been asserted before the Board, and the outcome is determined by whether the facts support that claim, a decision by the Board that they do not is a failure to prove the claim, not a lack of jurisdiction in the Board." *Id.* at 689. We conclude, however, that this error was harmless

because the AJ properly made his factual findings and properly held that Green failed to prove the necessary elements of his claim.

On appeal, Green bears the burden of establishing that the Board lacked substantial evidence to support its factual findings. *See Haynes v. Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984). In so doing, credibility determinations made by the Board are virtually unreviewable, *see Hambsch v. Department of the Treasury,* 796 F.2d 430, 436 (Fed. Cir. 1986), and we do not second guess management decisions of an agency, *see Haynes,* 727 F.2d at 1537, here the decision to require a second psychiatric examination by a specialist of its choosing.

Green contends that his refusal to submit to a second psychiatric evaluation was justified because the qualification standards chosen by the Postal Service were unreasonable under the circumstances, inconsistent with normal practice and beyond its discretion.

Title 5 U.S.C. § 8151(b)(2) (1994) provides, in pertinent part, that:

> The department or agency which was the last employer shall . . . make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency.

In carrying out this statutory requirement, 5 C.F.R. § 302.303 (1998) provides an agency, such as the Postal Service, with discretion to "limit consideration granted to applicants for specific positions or applicants who meet specific conditions, but must make those conditions a matter of record and must apply its policy uniformly to all eligible employees." In order to comply with section 302.303, the Postal Service issued its Employee and Labor Relations Manual. Section 546 of the Postal Service's Employee and Labor Relations Manual "requires" the Postal Service to conduct a "complete physical examination" before it restores an employee to duty, and the Postal Service's medical officer can further restrict, but not liberalize, any work restrictions set by OWCP. Further, the Postal Service has the right to collect and review all relevant information before making a decision to employ, transfer, reassign, reinstate or reemploy all applicants, including Green.

We do not discern that Green has been subjected to any unnecessary or additional processes or procedures by the Postal Service in connection with his reemployment. Asking that Green provide an updated employment application and submit to drug testing were normal and reasonable practices of the Postal Service required of all applicants, especially in cases where a considerable length of time had passed since the former employee had been employed with the Postal Service, as in Green's case (4 years).

Furthermore, the Postal Service's request that Green undergo a psychiatric evaluation by a specialist

selected by the Postal Service was not inconsistent with normal practices, beyond its discretion or unreasonable under the circumstances. First, considering Betty Jean Miller's testimony before the AJ, it was not inconsistent with normal practice of the Postal Service to request that Green undergo such an evaluation due to his history of significant mental illness. Miller, the Occupational Health Nurse Administrator for the agency's Las Vegas District, testified that she supervises medical evaluations for all applicants for reemployment, and that under agency regulations every applicant with a history of significant illness or injury is referred to a specialist before he or she is cleared for reemployment. This testimony clearly establishes that it was routine to request a psychiatric evaluation in the case of a significant mental illness, such as dysthymic disorder. Obviously, this examination is in addition to the routine physical examination also routinely required. Thus, it was not inconsistent with normal practice for the Postal Service to request such an evaluation in Green's case.

Second, it was not beyond the Postal Service's discretion to request that Green undergo a psychiatric evaluation. Admittedly, Green submitted to the Postal Service reports of his own psychiatrist and psychologist regarding his recovery from dysthymic disorder. In light of these reports and Dr. Collet's request that Green undergo a psychiatric evaluation by a specialist, the Postal Service determined that Green undergo a psychiatric evaluation by a specialist selected by the Postal Service. We cannot second

guess this managerial decision. *See Haynes,* 727 F.2d at 1537. In any event, it was not an abuse of the agency's discretion. Just because Green is entitled to priority consideration does not mean that he can evade lawful and reasonable protective measures set up by the Postal Service to ensure that an applicant meets the criteria for reemployment.

Finally, in light of Miller's testimony, it was also not unreasonable under the circumstances for the Postal Service to request that Green undergo a second psychiatric evaluation. Miller testified that because they were not administered by a board-certified psychiatrist, the evaluations presented by Green in support of his application for reemployment did not meet the agency's published standards governing such cases. Further, Miller testified that the medical clearance by Dr. Van Valkenburg assumed certain facts she knew to be in error. This testimony establishes the Postal Service's concern regarding the credibility of the psychiatric evaluation presented by Green and thus justified its desire to verify such evaluation with an opinion of a specialist selected by the Postal Service. Thus, without substituting our own credibility determinations for those of the Board or second-guessing management decisions of the agency, we believe that the Board's decision rejecting Green's appeal is supported by substantial evidence and was in accordance with law.

CONCLUSION

We conclude it was error for the AJ to dismiss Green's appeal for lack of subject matter jurisdiction. Considering all of the affirmable implicit and explicit findings of the AJ, however, we hold that this error was harmless. The AJ found the Postal Service met its burden of demonstrating that its actions were reasonable under the circumstances, consistent with its normal practice and that asking Green to provide additional information and submit to a second psychiatric evaluation by a specialist, and one selected by the Postal Service, was within its discretion. We agree. Even the delay Green complains of can be mostly attributed to his own conduct and reluctance to comply with the agency's reasonable requests. Finally, because he refused to undergo the second psychiatric evaluation, the Postal Service was justified in taking no further action on his priority reemployment request. Accordingly, the Board's decision rejecting Green's appeal is affirmed.

UNITED STATES OF AMERICA
MERIT SYSTEMS
PROTECTION BOARD
WESTERN REGIONAL OFFICE

RONALD L. GREEN,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
SF-0353-98-0372-I-1

DATE: June 19, 1998

Ronald L. Green, Green Valley, Nevada, pro se.

Douglas Alderman, Las Vegas, Nevada, for the agency.

BEFORE

Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant has filed an appeal of an alleged violation of his right to priority consideration for restoration to duty after full recovery from a compensable injury. Jurisdiction is asserted under 5 C.F.R. § 353.304(b). A hearing was held on June 4, 1998.

For the reasons set forth below, the appeal is DISMISSED for lack of Board appellate jurisdiction.

ANALYSIS AND FINDINGS

It is undisputed that the appellant was separated from his position with the Postal Service effective January 7, 1994, due to a compensable injury.[1] Record evidence establishes, and I find, that his compensation benefits began on or before April 14, 1994,[2] and ceased on December 15, 1997, because the appellant had fully recovered from the effects of his compensable injury.[3] On January 5, 1998, he timely requested priority consideration for reemployment with the Postal Service under 5 C.F.R. § 353.301(b), pertaining to full recovery more than one year after compensation began.[4]

In his appeal filed on February 28, 1998, the appellant alleges that the agency has effectively denied priority consideration, by requiring that he submit to medical and psychiatric evaluations as a condition of his reemployment. He also raises affirmative defenses of illegal discrimination, retaliation for prior EEO activity, and harmful procedural error. *See* IAF, Vol. 1, Tabs 1, 2; Vol. 2, Tabs 16, 17.

In response, the agency contends that no appealable action has been taken, in that priority consideration has not been denied; rather, the agency is in the

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[1] *See* Initial Appeal File (IAF), Vol. 1, Tab 11, Exhibit 1; Vol. 2, Tab 17, at 2.

[2] *See* id., Vol. 1, Tab 6, Subtab 14; Tab 11, Exhibit 2.

[3] *See* id., Vol. 1, Tab 2, at 2; Tab 6, Subtab 15.

[4] *See* id., Subtab 18.

process of determining whether the appellant satisfies the medical and other requirements necessary for reemployment. It also submits that this process has been delayed, in large part, by the appellant's own refusal to agree to the required evaluations. *See id.*, Vol. 1, Tab 6; Vol. 2, Tab 34.

The appellant bears the burden of proving that the Board has jurisdiction over this appeal, by preponderant evidence. *See* 5 C.F.R. § 1201.56(a); *Cox v. Merit Systems Protection Board,* 817 F.2d 100, 101 (Fed. Cir. 1987); *McCloud v. U.S. Postal. Service,* 71 M.S.P.R. 508, 511 (1996).

The appellant did not establish that any appealable action occurred; thus, he has not borne his burden of establishing Board appellate jurisdiction over the matter,

An excepted service employee, such as the appellant, who fully recovers[5] from a compensable injury more than one year after the date compensation began, is entitled to priority consideration for restoration to the position he left, or an equivalent one, under the procedures set forth in 5 C.F.R. Part 302. *See* 5 C.F.R. §§ 353.301(b), 304(b) (1998); *Raicovich v.*

[5] "Fully recovered" means that "compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one," 5 C.F.R. § 353.102 (1998). An employee is generally deemed to be fully recovered when his OWCP benefits cease. *See Kimble v. U.S. Postal Service,* 47 M.S.P.R. 251, 254, *aff'd,* 945 F.2d 417 (Fed. Cir. 1991) (Table).

United States Postal Service, 675 F.2d 417, 420-421 (Fed. Cir. 1982). Those procedures require that the agency place him on a priority reemployment list, and give him priority consideration over certain other job applicants for his former position or an equivalent one for which he qualifies, provided he requests reemployment within 30 calendar days after his compensation ceases. *See* 5 C.F.R. §§ 302.303(b), 302.304(a). An agency may limit consideration granted at its discretion to applicants who meet specific conditions, provided it makes those conditions a matter of record, and applies its policy uniformly to all eligible employees. *See* 5 C.F.R. § 302.303(a)(2). If the employee believes that he was denied restoration rights because of the employment of another person, he may appeal to the Board. *See* 5 C.F.R. § 302.501. See also *Welter v. Department of Transportation,* 73 M.S.P.R. 414, 420 (1997).

Here, the agency has admittedly hired others since January 1998, for positions in which it might have placed the appellant, had it not required that he submit to further, medical evaluation. *See* IAF, Vol. 2, Tab 17, at 2. At issue is whether the agency properly required the appellant to submit to the evaluation: if not, then the admitted hiring of other employees into positions for which he had priority, would bring the case within the Board's appellate jurisdiction under Part 353. *See Tisdale v. Department of the Treasury,* 44 M.S.P.R. 390, 394 (1990); *Benningfield v. Department of Transportation,* 21 M.S.P.R. 190, 192 (1984).

Joseph Gold, the Senior Personnel Training Specialist for the agency's Las Vegas District, testified that he directs the department that processes reemployment requests, and under the agency's regulations, even those who are entitled to priority consideration must be qualified before they can be rehired. Though no "one slot" is held for such applicants while the qualification process is completed, he tries to "move expeditiously" in such cases. In the appellant's case, Mr. Gold testified, he eliminated a number of the usual background and suitability checks, and asked only that the appellant provide an updated employment application, submit to drug testing, and undergo a medical evaluation. *See* Official Hearing Tapes (H.T.), testimony of Gold.

With respect to the latter, Betty Jean Miller, the Occupational Health Nurse Administrator for the agency's Las Vegas District, testified that she supervises medical evaluations for all applicants for reemployment, and under agency regulations, every applicant with a history of significant illness or injury is referred to a specialist before he or she is cleared for duty. She also testified that the appellant's injury was psychiatric in nature, and the medical clearance that he presented in support of his application did not meet the agency's published standards governing such cases, because it was not given by a board-certified psychiatrist. Further, she testified, it assumed certain facts she knew to be in error; i.e., several supervisors with whom the appellant had previously been in conflict were said to have left the

workplace, when they were in fact still there. Accordingly, an additional, psychiatric evaluation was ordered. *See* H.T., testimony of Miller.

With regard to the timing of these events, the following is not in dispute. OWCP did not provide either the appellant or the agency with official notice[6] that compensation had ceased until February 17, 1998, or thereafter.[7] By letter dated February 24, 1998, Joe Gold requested an updated employment application.[8] On February 28, 1998, the appellant wrote to Mr. Gold, declining to provide one, and also filed the captioned appeal.[9] After more correspondence, the update was provided by the appellant on March 6, 1998.[10] By letter dated March 11, 1998, the agency directed the appellant to report for a drug screen on March 16, 1998.[11] The laboratory then processed the sample, and on March 25,1998, he was

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[6] The appellant testified that his request for reemployment dated January 2, 1998, was premised on the fact that he had not received his normal compensation as expected, and assumed this meant that compensation had ceased. *See* H.T., testimony of appellant.

[7] *See* IAF, Vol. 1, Tab 6, Subtabs 13-18.

[8] *See* id., Subtab 12. Mr. Gold testified that he requested only an application at that point, to assure that it did not include any new information, such as recent criminal convictions, that might be disqualifying in and of itself. *See* H.T., testimony of Gold.

[9] *See* id., Subtabs 10, 11.

[10] *See* IAF, Vol. 1, Tab 6, Subtab 8.

[11] *See* id., Subtab 7.

found qualified for further employment consideration.[12] The appellant was then scheduled for a physical examination, to take place on April 6, 1998.[13] At that time, the examining physician found him physically fit, but referred him for "Specialist evaluation – Psychiatrist re: ability to perform for USPS given past history and current status." Accordingly, an appointment was scheduled with a psychiatrist for April 27, 1998.[14] By letter dated April 25, 1998, the appellant objected to this evaluation and initially refused to attend.[15] Further correspondence ensued, his objections were resolved, and by letter dated May 21, 1998 – the same day as the prehearing conference in this appeal – the appellant agreed to cooperate.[16]

Based on the foregoing, I find that the agency's actions were reasonable under the circumstances, and consistent with its normal practice. I find further that in asking the appellant to provide additional information, and submit to a psychiatric evaluation, it acted within its discretion under 5 C.F.R. § 302.303(a)(2), to set reasonable conditions on reemployment, even for those

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[12] *See* id., Subtab 4.

[13] *See* IAF, Vol. 1, Tab 6, at 1 ("Correction, etc."); *id.*, Subtab 1, at 3. Mr. Gold testified that the drug screen was also potentially disqualifying, in and of itself, and therefor had to be ordered separately. *See* H.T., testimony of Gold.

[14] *See* IAF, Vol. 2, Tab 15, Subtab 28, 29; H.T., testimony of appellant.

[15] *See* id., Vol. 1, Tab 8, Subtab 20.

[16] *See* id., Vol. 2, Tab 15, Subtab 30.

entitled to priority consideration. To the extent that the appellant complains of the ensuing delay, I find that it was caused, in large part, by his own reluctance to comply with these requests. Thus, the appellant has not established that the agency's actions prior to February 28, 1998, when this appeal was filed, or at any time since that date, constituted an effective denial of priority consideration, over which the Board may assume jurisdiction. *See Benningfield,* 21 M.S.P.R. at 191-92; *Tisdale,* 44 M.S.P.R. at 394.

As there is no appealable matter before the Board, this is not a "mixed case," and the appellant's affirmative defenses of illegal discrimination, retaliation for prior EEO activity, and harmful procedural error are not within the Board's jurisdiction. *See* 5 C.F.R. § 1201.15 1(a)(1); *Cruz v. Department of the Navy,* 934 F.2d 1240, 1245-46 (Fed.Cir. 1991). Accordingly, I do not address those defenses, and do not provide the appellant with mixed case appeal rights. *Id.*

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 24, 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board, However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the

Board that is already part of the record. Your petition must be post-marked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 3, 2007.

FOR THE COURT,

/s/ Jan Horbaly

Jan Horbaly
Clerk

Dated: 07/27/2007

cc: Ronald L. Green
William P. Rayel

GREEN V USPS, 2006-3425
(MSPB – SF0353050977-1-1)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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5 U.S.C.S.§ 7702. Actions involving discrimination:

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who –

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by –

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C.S. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and section.

(2) (not applicable)

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of –

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

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5 U.S.C.S. § 7703. Judicial review of decisions of the Merit Systems Protection Board:

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision,

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any

such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under section 7702.

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be –

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section (is) referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

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5 U.S.C.S. § 8128. Review of award:

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may –

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter [5 U.S.C.S.§§8101 et seq.] is --

(1) final and conclusive for all purposes and with respect to all questions of law and fact;

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

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5 U.S.C.S. § 8151. Civil service retention rights:

(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter [5 USCS §§ 8101 et seq.] shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management –

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable

disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and

(2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency.

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29 U.S.C.S. § 705. Definitions:

(20)(B) Certain programs; limitations on major life activities. Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of section 2, 14, and 15, and titles II, IV and VII of this Act [29 U.S.C.S. §§ 701, 714, 715, 760 et seq., 780 et seq., 791 et seq., 796 et seq.] any person who –

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

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29 U.S.C.S. § 794 Nondiscrimination under Federal grants and programs:

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C.S. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

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5 C.F.R. § 302.202. Qualification requirements:

Before making an appointment to a position covered by this part, each agency shall establish qualification standards such as those relating to experience and training, citizenship, minimum age, physical condition, etc., which shall relate to the duties to be performed. An agency may delegate the establishment of standards relating to a group of positions or a specific

position to the appropriate administrative level or subdivision in accordance with the needs of the locality in which the position is located, but the agency shall determine that each standard established is in conformity with this part. Each agency shall make its standards a matter of record in the appropriate office of the agency, and shall furnish information concerning the standards for a position to an applicant on his/her request. Each agency shall apply the standards for a position uniformly to all applicants, except for such waivers as are provided in this part for a preference eligible.

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5 C.F.R. § 302.303. Maintenance of employment lists:

(a) Establishment –

(1) Agency obligation. An agency must establish a priority reemployment list whenever any applicants rated eligible under § 302.302 meet the conditions set out in paragraphs (b)(1) through (b)(3) of this section and must consider candidates from that list in accordance with § 302.304(a). All applicants not included on the priority reemployment list will be listed on the regular employment list unless the agency elects to establish a reemployment list as provided in paragraph (c) of this section.

(2) Agency discretion. In establishing its lists, an agency may, but is not required to: Afford priority consideration to non-preference eligibles who meet the conditions set out in

paragraph (b)(4) of this section; afford priority consideration under paragraph (b) of this section for a longer time and/or in a broader geographic area than the minimum requirement; and/or provide reemployment consideration after the priority list is exhausted to additional current and former employees in accordance with paragraph (c) of this section. An agency may limit consideration granted at its discretion to applicants for specific positions or applicants who meet specific conditions, but must make those conditions a matter of record and must apply its policy uniformly to all eligible employees.

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5 C.F.R.§339.301(e). Authority to require an examination:

(1) An agency may order a psychiatric examination (including a psychological assessment) only when:

(i) The result of a current general medical examination which the agency has the authority to order under this section indicates no physical explanation for behavior or actions which may affect the safe and efficient performance of the individual or others, or

(ii) A psychiatric examination is specifically called for in a position having medical standards or subject to a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under (i) or (ii) above must be

conducted in accordance with accepted professional standards, by a licensed practitioner or physician authorized to conduct such examination, and may only be used to make legitimate inquiry into a person's mental fitness to successfully perform the duties of his or her position without undue hazard to the individual or others.

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5 C.F.R. § 353.104. Notification of rights and obligations.

(a) When an agency separates, grants a leave of absence, restores or fails to restore an employee because of uniformed service or compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights.

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5 C.F.R. § 353.301(b). Restoration rights, Fully recovered after 1 year:

Any employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular fulltime employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of

compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the excepted service.

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29 C.F.R. § 1630.2. Definitions.

(g) Disability means, with respect to an individual –

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

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29 C.F.R. § 1630.10. Qualification standards, tests, and other selection criteria:

It is unlawful for a covered entity to use qualifications standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

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29 C.F.R. § 1630.13. Prohibited medical examinations and inquiries:

(a) Pre-employment examinations or inquiry. Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

U.S.Postal Service Employee and Labor Relations Manual § 546.13, Issue 12, dated 05/01/89:

131. Obligation. When an employee has fully overcome the injury or disability more than 1 year after compensation began, the USPS must give an employee priority consideration for reemployment into the former position or an equivalent one. The names of all former employees who fully recover from their compensable disabilities more than 1 year after compensation begins must be entered on a reemployment list in two groups:

a. Group one will include all those former employees who are entitled to 10-point veteran preference.

b. Group two will include all other former employees who fully recover from their compensable disabilities in more than 1 year. Persons in group one will be considered for employment before persons in group two; and persons in group two will be considered

before other sources of recruitment, such as transfers from other agencies, reinstatements, or appointments from hiring registers.

132. Rights and Benefits. Rights and Benefits are the same as those outlined in 546.122 (Upon reemployment, all rights and benefits that an employee would have had or acquired in the former position had there been no injury or disability must be restored.